

89-595

No. \_\_\_\_\_

FILED

OCT 11 1989

JOSEPH F. SPANIOLO, JR.  
CLERK

IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1989

JOHN M. RATELLE,

Petitioner,

v.

DWIGHT EDWARD MARTIN,

Respondent.

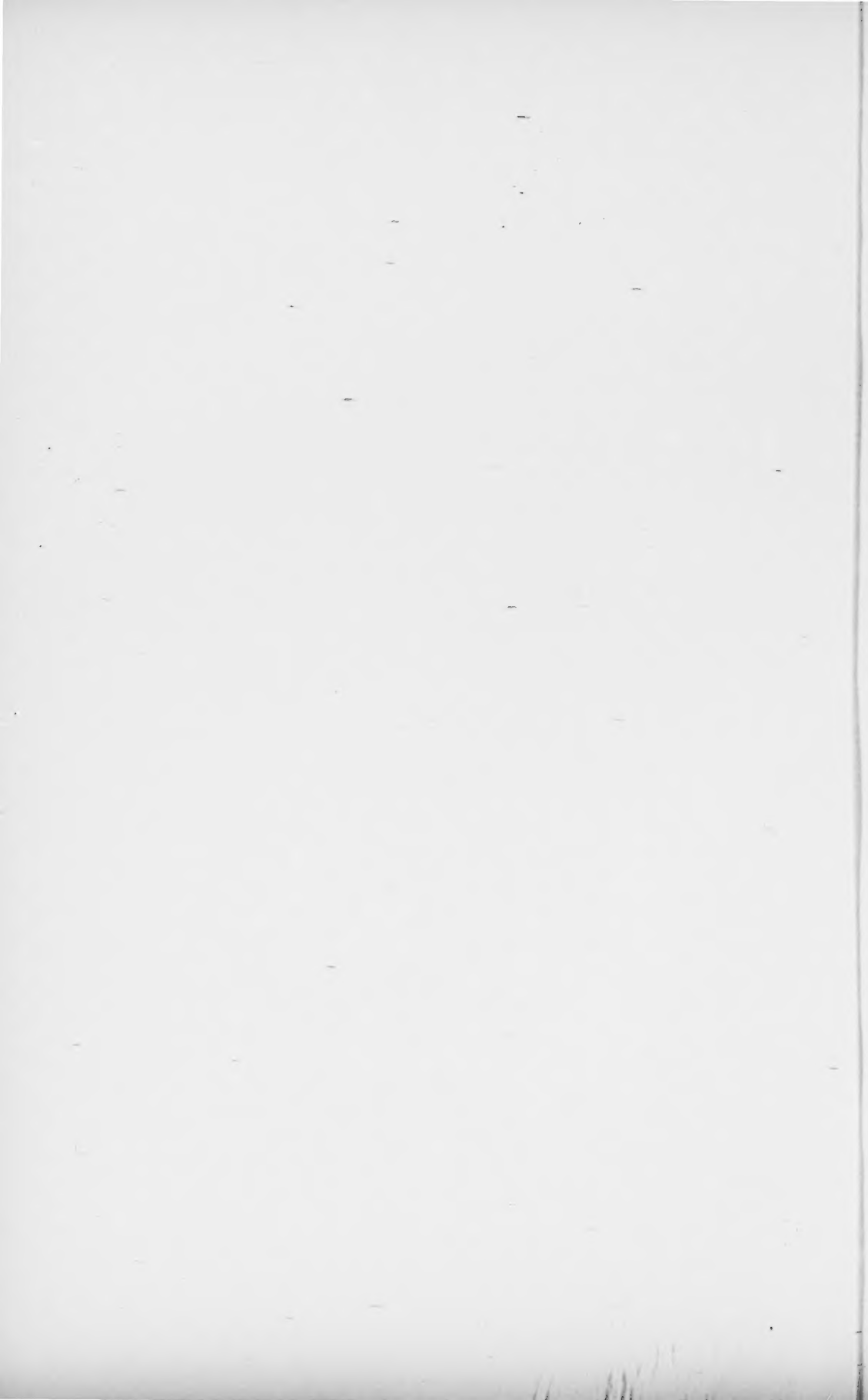
PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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## QUESTIONS PRESENTED

1. Whether a motion for self-representation that is made on the eve of trial and that would have delayed the trial proceedings if it had been granted is nevertheless timely as a matter of law unless the state can prove that it was made solely to delay the trial proceedings.

2. Whether a state defendant is procedurally barred from obtaining relief in federal habeas corpus proceedings where he ignored the state's procedural requirement, mandated by the state's highest court, that a motion for self-representation must be made within a reasonable period of time prior to the trial so as not to disrupt the orderly administration of justice.

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DWIGHT EDWARD MARTIN,

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PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

---

Petitioner John M. Ratelle, respectfully urges that this Honorable Court grant this Petition for Writ of Certiorari, seeking review of the judgment of the Court of Appeals for the Ninth Circuit, filed May 22, 1989, affirming the judgment of the United States District Court for the Central

District of California granting a conditional writ of habeas corpus.

#### OPINIONS BELOW

A memorandum decision of the United States Court of Appeals for the Ninth Circuit of April 2, 1987, remanding the case to the United States District Court for the Central District of California for further proceedings, appears as Appendix A. The subsequent memorandum decision of the Ninth Circuit, filed on May 22, 1989, affirming the district court's conditional granting of the writ, appears as Appendix B. The order of the United States Court of Appeals for the Ninth Circuit denying petitioner's petition for rehearing and suggestion for rehearing en banc, filed August 10, 1989, appears as Appendix C.

The judgment of the United States District Court for the Central District

of California, filed August 31, 1987, and the report and recommendation in support thereof, appear as Appendix E.

The opinion of the California Court of Appeal, Second Appellate District, Division Two, appear as Appendix F.

#### JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on May 22, 1989. (Appendix B.) On August 10, 1989, an order was filed by the Ninth Circuit denying the petition for rehearing and rejecting the suggestion for rehearing en banc. (Appendix C.) The period pending the petition for rehearing tolled the period in which the petition for certiorari must be filed. (Department of Banking v. Pink, 317 U.S. 264, 266 (1942); Gypsy Oil Company v. Escoe, 275 U.S. 498 (1927).) Thus, this petition is being filed timely. (28

U.S.C. § 2101(c).)

Jurisdiction is invoked pursuant to section 1254(1) of Title 28 of the United States Code. Because the within petition is timely filed from the decision of the Ninth Circuit, May 22, 1989, and the order denying the petition for rehearing of August 10, 1989, this Court has jurisdiction to determine questions raised in the prior appeal to the Ninth Circuit arising out of the same litigation. (Mercer v. Theriot, 377 U.S. 152, 153-154 (1964).)

#### CONSTITUTIONAL PROVISION INVOLVED

The Sixth Amendment to the United States Constitution provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been



committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

#### STATEMENT OF THE CASE

##### A. Summary of Proceedings Below

Respondent was sentenced to state prison for 15 years to life for murder of the second degree, which term was enhanced by two years for use of a fire-arm during the commission of the offense. (CT 112.)<sup>1/</sup>

The California Court of Appeal,

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1. "CT" refers to the Clerk's Transcript on respondent's state appeal.

Second Appellate District, Division Two, affirmed the judgment of conviction. (Appendix F.) Respondent filed two petitions for writ of habeas corpus in the California Supreme Court. (Docket No. 5, Exhs. B, C.)<sup>2/</sup> The California Supreme Court denied the petitions without citation of authorities. (1985 Official Cal. Adv. Sheets, Vol. 6, Supreme Ct. Mins., p. 618.)

Respondent filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. The pertinent issue

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2. "Docket No." refers to the designated number of the Clerk's Record on the appeal in the Ninth Circuit. Each document filed in the United States District Court for the Central District of California is entered in a docket sheet in accordance with the sequence in which it is filed in the case. The document retains the same docket number designation in the Ninth Circuit. (See, generally, Rule 28-2.8, Rules of the Ninth Circuit.)

raised in the petition was whether respondent was unconstitutionally denied the right to self-representation where the motion was made on the eve of trial. (Docket No. 1, p. 6.) Petitioner filed a return to the petition for writ of habeas corpus. (Docket No. 5.)

The United States District Court found that the request for self-representation made on the date set for trial was timely as a matter of law because there was nothing in the state record to show that respondent requested self-representation to delay the trial proceedings. The court also concluded that the effect of the delay on the trial proceedings because of the motion for self-representation is not an appropriate legal standard to utilize in evaluating the timeliness for the motion for self-representation. The court also deter-

mined that respondent exercised diligence in requesting self-representation and that the denial of the request for a continuance was thus improper. (Appendix E.)

Following the district court's judgment, the Ninth Circuit held that the request for self-representation was timely as a matter of law unless it was made for the purpose of delay. The court observed that the state courts did not find that the request for self-representation was made to delay the trial proceedings but rather the state appellate court only evaluated the effect of the delay. The court then remanded to the district court on the issue of respondent's request for a continuance. The pertinent portion of the Ninth Circuit's opinion reads as follows:

"Therefore, we remand to the dis-

trict court to decide whether a hearing should be held and, if there was an abuse of discretion, to re-issue the writ. If the district court determines there was no abuse of discretion in denying the motion to continue, the district court should decide what impact that has, if any, on *Faretta* error." (Appendix A.)

Upon remand, both parties agreed that an evidentiary hearing was not essential. (Docket Nos. 35-36.) The district court again granted the conditional writ of habeas corpus. (Docket No. 42.) The pertinent portion of the report and recommendation in support of the judgment reads as follows:

"This Magistrate has inquired of petitioner and respondent as to whether they believe this Court

should conduct a hearing. Both parties have indicated that there is no need for a hearing. The Magistrate concurs.

"Assuming that there was a request by petitioner for a continuance, the Magistrate concludes that there was an abuse of discretion by the trial judge in not granting it for the following combination of reasons:

"1. The trial court made no inquiry as to petitioner's reasons for wanting to represent himself.

"2. The trial judge did not inquire of petitioner as to his reason for not being able to proceed immediately (his counsel was not able to proceed immediately either). The judge did not inquire as

to whether petitioner could have proceeded on the next day or just how long a continuance he was seeking, and

"3. The trial did not actually commence until seven days after petitioner had made his request." (Appendix D; Docket No. 38.)

On the appeal, the Ninth Circuit Court of Appeals held that the trial court abused its discretion in denying the continuance. In so ruling, it found that respondent exercised diligence in that the source of his discontent with counsel did not arise until the day of trial and that respondent was prejudiced because the failure to grant the continuance effectively deprived him of the opportunity to exercise the right to represent himself. (Appendix B.)

B. Facts Pertinent to a  
Determination of this Petition

On November 5, 1980, respondent, with counsel present, was arraigned and pleaded not guilty to murder. (CT 1-2.) On November 26, 1980, a pretrial conference was held. The sheriff was directed to allow respondent to make two phone calls at his own expense. (CT 3.) Several requests for continuances on behalf of the defense were granted. (CT 4-7.) On January 2, 1981, the trial was continued on stipulation of the parties because the witnesses were not available. (CT 8.) On motion of the defense, two further continuances were granted. (CT 9-10.) Then on February 23, 1983, the public defender declared a conflict of interest and new counsel was appointed



to represent respondent. (RT 1-2.)<sup>3/</sup>

On April 28, 1981, the date set for trial, defense counsel informed the trial court that respondent indicated a desire to represent himself. The court indicated it would allow respondent to represent himself but that the trial would proceed that day. (Aug. RT 1-2.)<sup>4/</sup> However, respondent stated that he was not ready to proceed with the trial. (Aug. RT 3, lines 5-9.) The following pertinent proceedings then transpired:

"THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to repre-

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3. "RT" refers to the Reporter's Transcript on respondent's state appeal.

4. "Aug. RT" refers to the Augmented Reporter's Transcript on the state appeal.

sent himself is untimely because I have no intent of continuing this case.

"THE DEFENDANT: I am letting the court know I [sic] like to represent myself.

"THE COURT: If you are ready to proceed to trial today, you can represent yourself --

"THE DEFENDANT: I was ready in December. When the People wasn't ready, I gave the People time. Now, why can't the People give me time?

"THE COURT: I have no intent of giving you any time. This case goes back to May 30, 1980. It has been a year, so I have no --

"THE DEFENDANT: It has not been a year. I have been in custody for seven months.

"MR. MASON: We are going to ask

that this matter trial for a few days so we can do a witness check to ascertain--

"THE COURT: Well, the matter will simply trail Mr. Goldstein's matter, the one he is engaged in. As soon as that one is over, we will commence this one. And I expect that to be what, two, three days." (Aug. RT 3-4.)

The court made the following findings of fact:

"THE COURT: All right. The court will find the defendant's motion to represent himself is untimely on the basis that this matter is approximately a year old and the defendant is not ready to represent himself in the matter. So the motion will be declared untimely. The matter will simply trail until Thursday." (Aug.

RT 4, lines 10-15.)

The trial commenced on May 7, 1981. (CT 26.) Respondent was afforded an opportunity prior to the commencement of trial to be heard with regard to his complaints regarding his allegations of ineffective representation or to move for substitution of counsel in that it was noted that there was a Marsden motion that was pending. (RT 3, lines 11-12.) It is common knowledge that such a motion in California refers to People v. Marsden, 2 Cal.3d 118 [84 Cal.Rptr. 156, 465 P.2d 44] (1970), in which it was held that the state defendant is entitled to a hearing on his complaints about counsel or to request substitution of counsel. However, when the trial court stated, prior to the actual testimony, that it was about to consider the motion, respondent personally stated, "I'd like to

withdraw that motion on *Marsden* hearing."  
(RT 10, lines 9-11.)

When the issue of the denial of the request for self-representation and a continuance was raised in the California Court of Appeal, the court found that "to have granted his request would have resulted in unjustifiable delay of the trial and obstruction of the orderly administration of justice." (Appendix F, p. 7.)

\* \* \* \* \*

REASONS WHY THE PETITION FOR  
WRIT OF CERTIORARI SHOULD BE  
GRANTED

\* \* \* \* \*

ARGUMENT

I

THE DECISION BELOW IS IN CONFLICT  
WITH MANY STATE COURT DECISIONS AND  
A CIRCUIT COURT OF APPEALS DECISION  
AS TO WHAT CONSTITUTES A TIMELY  
MOTION FOR SELF-REPRESENTATION AND  
WILL RESULT IN THE DISRUPTION OF  
THE ADMINISTRATION OF JUSTICE BY  
AFFORDING STATE DEFENDANTS THE  
OPPORTUNITY TO DELAY TRIAL  
PROCEEDINGS UNDULY

The Court of Appeals for the Ninth  
Circuit held that a request for self-  
representation is timely as a matter of  
law if it was made before the jury was  
empaneled unless the state defendant's  
purpose was to delay the trial proceed-  
ings. (Appendix A, pp. 1-2.) Although  
the memorandum opinion of the Ninth  
Circuit is not published, this is a  
recurring issue in that it is based on

the Ninth Circuit's interpretation of what constitutes a timely motion for self-representation. (See Armant v. Marquez, 772 F.2d 552, 556 (9th Cir. 1985), holding (1) that a request for self-representation is timely as a matter of law unless it was made to secure a delay of the trial proceedings and (2) that the effect of the delay is not a ground to deny self-representation even though the motion was made on the eve of trial. (See, also, Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982).)

The California Supreme Court has addressed the issue on numerous occasions. Recently it summarized the law and held that to be timely, the motion for self-representation must be made within a reasonable time prior to trial and when it is made on the eve of trial, it is left to the trial court's sound

discretion to grant or to deny the motion. The court found that the federal rule that a motion for self-representation made on the eve of trial, unless made to delay the trial proceedings, is timely as a matter of law, to be too rigid. (People v. Burton, 48 Cal.3d 843, 852-854 (1989); see, also, People v. Moore, 47 Cal.3d 63, 69 [252 Cal.Rptr. 494, 762 P.2d 1218] (1988); People v. Windham, 19 Cal.3d 121, 128 [137 Cal.Rptr. 8, 560 P.2d 1187] (1977).) Several other states are in accord with California's holding that a request for self-representation made on the day of trial is not timely as a matter of law but rather whether to grant the motion is left to the discretion of the trial court. (See, for instance, State v. Garcia, 92 Wash.2d 647 [600 P.2d 1010, 1015] (1979); Williams v. State, 655 P.2d



273, 276 (Wyo. 1982); State v. Kender, 21 Wash.App. 622 [587 P.2d 551, 553-554] (1978); State v. Herron, 736 S.W.2d 447, 449 (Mo. 1987).) Further, the Eighth Circuit has held that it is proper to deny a motion for self-representation that was made on the day of the trial. (Parton v. Wyrick, 704 F.2d 415, 416-417 (8th Cir. 1983).)

To allow defendants to await the day of trial to request self-representation can be very disruptive of the orderly administration of justice. Nevertheless, the Ninth Circuit has made it explicit that a showing that the effect of the delay is to disrupt the court proceedings is not a sufficient showing to justify the denial of self-representation that was made on the date set for trial. (Appendix A, pp. 2-3.) This holding clearly encourages defendants to wait

until the date set for trial before requesting self-representation because it is very difficult to show that the motive was to secure a delay of the trial proceedings. Most importantly, the holding of the Ninth Circuit is contrary to this Court's statement in Faretta v. California, 422 U.S. 806, 834, fn. 46 (1975), that the right to self-representation is not a license to fail to abide by relevant rules of procedure. In other words, California has adopted a relevant rule of procedure which requires that state defendants make a motion for self-representation within a reasonable period prior to trial. Where a state defendant, such as respondent herein, has failed to follow that procedure, he has not met the requirements of Faretta for self-representation.

Faretta makes it explicit that the

right to self-representation may not be utilized to disrupt the court proceedings. (Faretta v. California, supra, 422 U.S. at p. 834, fn. 46.) The procedure followed by respondent is most disruptive of court proceedings in that not only did he wait until the day set for trial to request self-representation but he also indicated he was not ready to proceed (Aug. RT 3, lines 5-9), thus necessitating a continuance of undetermined length to effectuate self-representation. Although, as shown, respondent was afforded an opportunity to indicate dissatisfaction with his counsel and thereby show the need for self-representation, he waived his right to do so. Nevertheless, the Ninth Circuit placed the burden on petitioner to show why respondent did not need a continuance, especially to show why respondent

was not diligent and why he did not suffer prejudice. (Appendix B.) This is contrary to state law (People v. Burton, supra, 48 Cal.3d at pp. 852-854) and federal decisional law which places the burden on the state defendant to show prejudicial error in the denial of a request for a continuance. (See the excellent discussion in McFadden v. Cabana, 851 F.2d 784, 788 (5th Cir. 1988).)

Petitioner strongly urges that because of the disruptive effect on the administration of justice that is caused by last minute requests for a continuance and because the person who is requesting the continuance is in the best possible position to set forth his personal reasons for the continuance, the failure to justify the need, first in the trial court, and then in federal habeas

corpus proceedings, should be deemed fatal to his position. Therefore, to prevent needless disruption of court proceedings and to resolve the conflicts between the Ninth Circuit decisional law and that of many of the states and of some of the other circuits, the foregoing conflicts should be resolved by this Court so as to preserve the administration of justice.

## II

A HEARING IS NECESSARY TO RESOLVE  
THE APPARENT CONFLICT OF THE NINTH  
CIRCUIT DECISION WITH THIS COURT'S  
DECISIONS MANDATING THAT STATE  
DEFENDANTS MUST FOLLOW STATE  
PROCEDURAL RULES AND SAFEGUARDING  
STATE'S RIGHTS TO ENFORCE THOSE  
RULES BY INVOKING THE WAIVER DOCTRINE

In 1977, over three years prior to respondent's requesting self-representation (Aug. RT 1-2), the California Supreme Court cemented the procedural requirement that a state defendant must

make a request for self-representation within a reasonable period before trial and that, if he waits until the eve of trial, he then must justify the delay. (People v. Windham, supra, 19 Cal.3d 121, 128.) As shown in the statement of the facts, respondent did not make any attempt to justify the last minute request for self-representation. In fact, when respondent was afforded an opportunity to set forth his reasons for dissatisfaction with his counsel, he waived his right to a hearing on the issue. (RT 10.)

California regularly denies motions for self-representation where the request is made on the eve of trial and where the delay is not justified in the trial court. (See, e.g., People v. Burton, supra, 48 Cal.3d 843, 852-854; People v. Moore, supra, 47 Cal.3d 63, 79; People v.

Windham, supra, 19 Cal.3d at p. 128.) Moreover, in the instant case the motion for self-representation in conjunction with the request for a continuance was denied for the specific reason that it was not timely and because there was no justification for the untimely filing of the motion. (Appendix F.)

In view of the foregoing fact, respondent has waived his right to raise the self-representation issue for the following reasons: (1) Respondent failed to follow state mandated procedures by making a timely request for self-representation. (2) Respondent has not justified the failure to have followed state procedures in that he was afforded ample opportunity to raise the issue in the state trial court but failed to do so. (3) The state reviewing court declined to entertain the issue because



of respondent's default. (4) The California Supreme Court has mandated that requests for self-representation must be made a reasonable period before the trial unless the state defendant justifies before that court the reasons for the delay. Thus, since respondent's failure to have followed state procedures resulted in a procedural default and because he cannot justify his failure to have exercised the opportunity in the state trial court to justify his tardiness in the making of the motion for self-representation, he is procedurally barred from obtaining relief. (Teague v. Lane, \_\_\_ U.S. \_\_\_ [103 L.Ed.2d 334, 109 S.Ct. 1060, 1068] (1989).) The application of the waiver doctrine, as set forth herein, is not contrary to Faretta but is in accord with the holding of Faretta which essentially grants the rights to



self-representation only where: (1) the defendant intelligently waived the right to counsel; (2) the defendant unequivocally requested self-representation; and (3) the request was made weeks before the trial. (Faretta v. California, supra, 422 U.S. at pp. 835-836.) -

There are divergent views expressed by the states regarding the procedural requirement for the timely assertion of the self-representation claim, especially, where, as here, the state defendant seeks a continuance to secure self-representation. Accordingly, it is crucial that this Court determine the issue of whether the state courts are free to set forth rules relevant to the right to self-representation so as to ensure that the state defendant's exercise of that right does not disrupt the administration of justice.

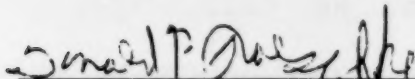
CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit.

DATED: October 5, 1989.

Respectfully submitted,

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APPENDIX A



NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DWIGHT EDWARD MARTIN,	)	No. 85-6593
	)	
Petitioner-Appellee,	)	D.C. No.
	)	CV-85-1732-
-vs-	)	RMT(JR)
	)	
DANNY VASQUEZ, Warden,	)	MEMORANDUM
	)	
Respondent-Appellant.)	)	

---

Appeal from the United States District  
Court for the Central District of  
California Robert M. Takasugi,  
District Judge, Presiding  
Submitted September 23, 1986\*

Before: WALLACE, HUG, and KOZINSKI,  
Circuit Judges.

Warden Vasquez appeals the district court's conditional grant of a writ of habeas corpus. The district court found that Martin was denied his sixth

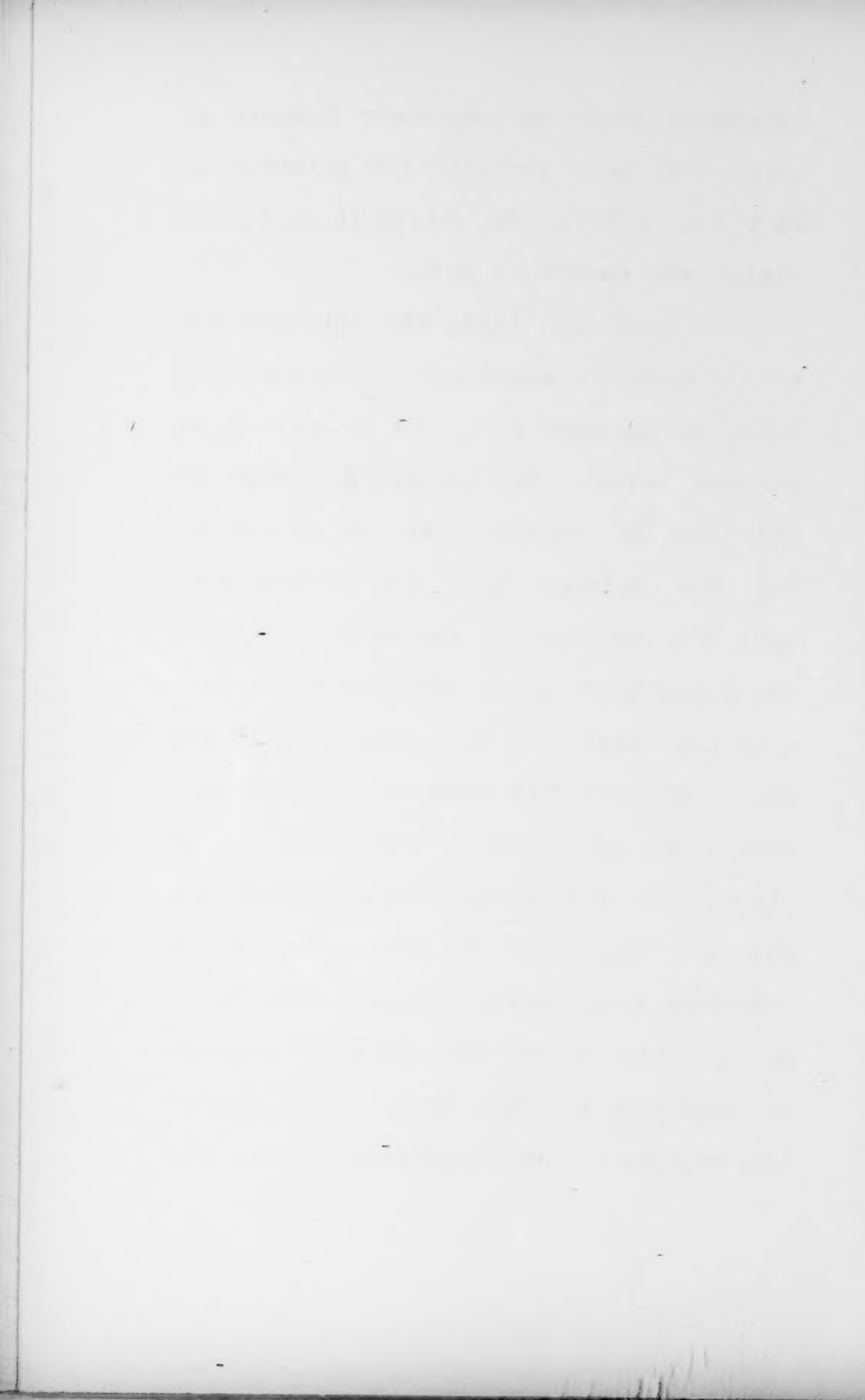
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\* The panel is unanimously of the opinion that oral argument is not required in this case. Fed. R. App. P. 34(a).



amendment right to represent himself at trial. We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm in part, and vacate and remand in part.

On April 28, 1981, the date set for trial, Martin's appointed counsel was not ready to proceed with the trial due to another trial. Martin alleges that on that day he learned that two witnesses for his defense were not subpoenaed. Upon his request to represent himself, the state trial court demanded he proceed with the trial that day. Martin's lawyer could not get his case file to Martin until the next day. The trial judge stated that a jury could be selected that day and the rest of the trial could commence after Martin secured the file. Martin said he was not ready to proceed on that day and the trial court denied the request for self-representation. The

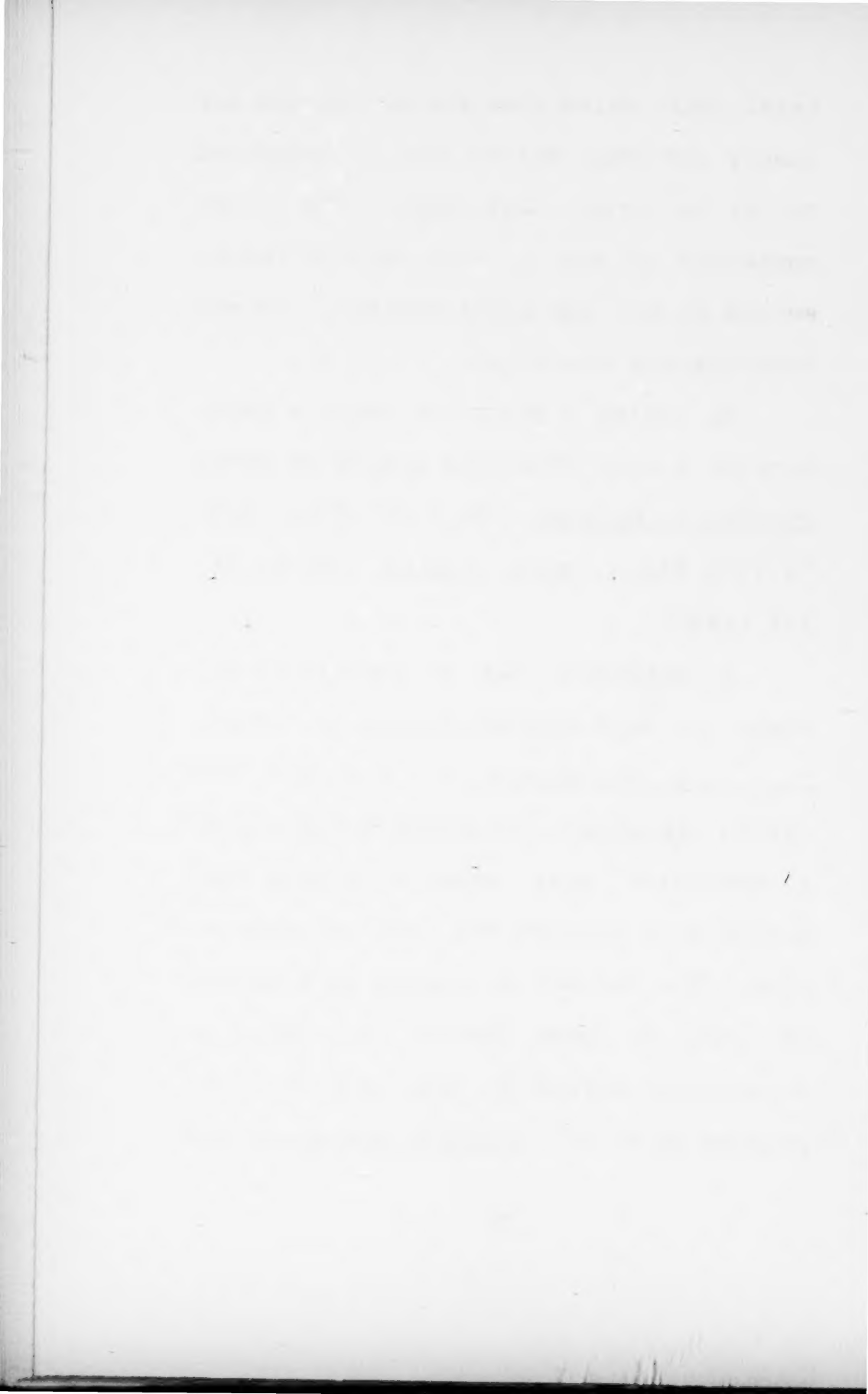




trial court ruled that the motion was not timely and that Martin was not prepared to go to trial that day. The trial commenced on May 5, with Martin represented by his appointed counsel. He was subsequently convicted.

We review a district court's issuance of a writ of habeas corpus de novo. Chatman v. Marquez, 754 F.2d 1531, 1533-34 (9th Cir.), cert. denied, 106 S. Ct. 124 (1985).

A defendant has a constitutional right to self-representation at trial. Faretta v. California, 422 U.S. 806, 832 (1975) (Faretta). To preserve his right, a defendant must make a timely and unequivocal request for self-representation. The request is timely, as a matter of law, if made before the jury is impaneled, unless it was made for the purpose of delay. Fritz v. Spalding, 682



F.2d 782, 784 (9th Cir. 1982).

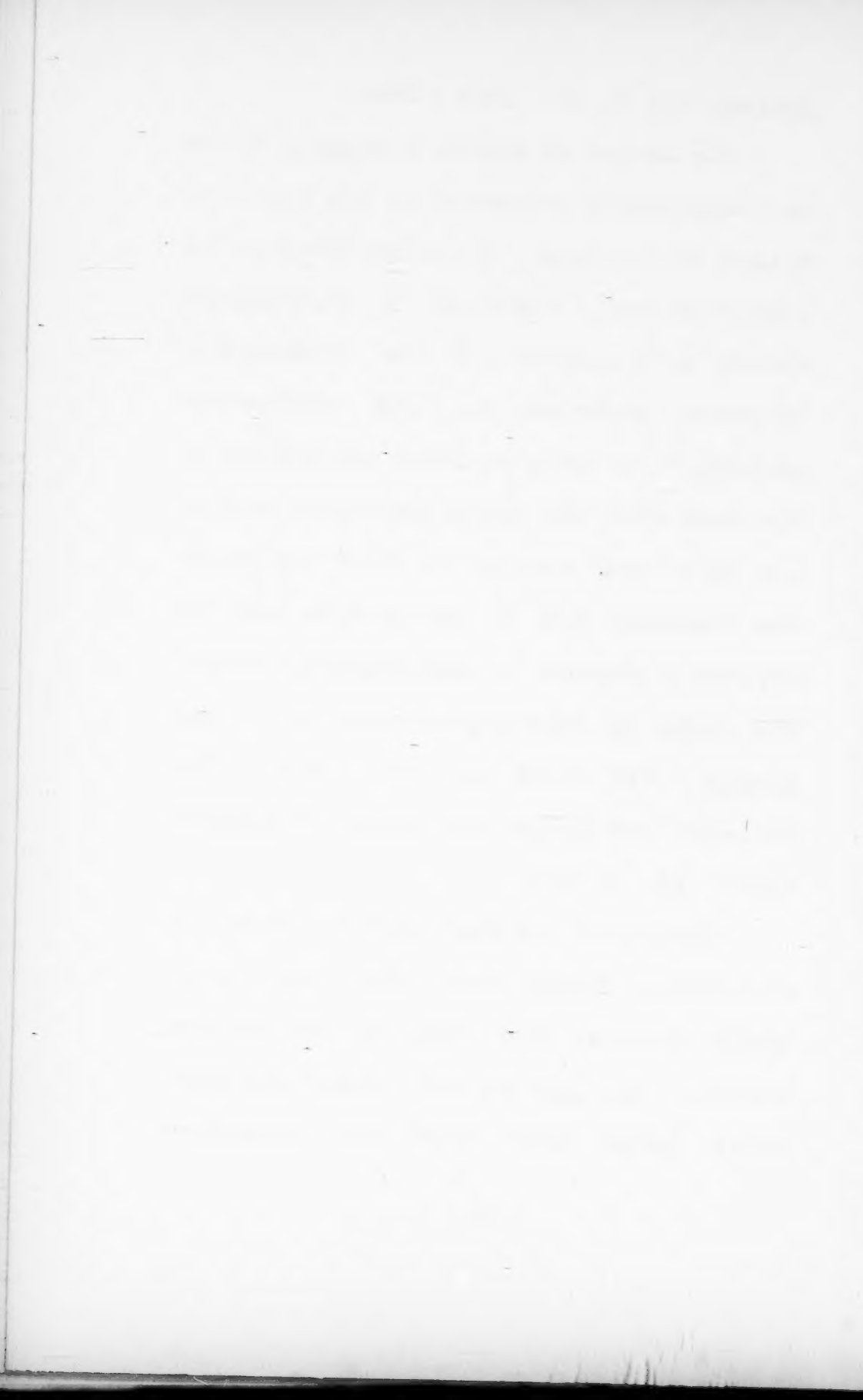
Here, Martin asserted his Faretta right the morning his trial was scheduled to start and before the jury was impaneled. It was, therefore, timely as a matter of law unless it was made for the purpose of delay. Neither the state trial court nor the state appellate court found that Martin's request was made for the purpose of delay. Although Vasquez argues that there was an implied finding to this effect, it is clear that the state appellate court only evaluated whether granting the request would have the effect of delay. Where, as here, there is no state court finding that a request for self-representation was made for the purpose of delay, a district court need not conduct an evidentiary hearing. Armant v. Marquez, 772 F.2d 552, 556 (9th Cir. 1985) (Armant), cert.



denied, 106 S. Ct. 1502 (1986).

The denial of Martin's Faretta claim is inextricably connected to his implicit motion to continue. Although there is no constitutional right to a continuance absent a violation of the fundamental fairness mandated by the fourteenth amendment, we have included the motion to continue with our sixth amendment analysis in a case similar to this one where the "request for a continuance was in essence a request to meaningfully assert the right to self-representation." See Armant, 772 F.2d at 556, 557. We reviewed the denial for abuse of discretion. Id. at 556.

Obviously, we must test for abuse of discretion based upon what the trial judge knew at the time he denied the motion. Cf. id. at 557 (observing that trial judge knew that the defendant



wished to make motions his attorney had not made and call witnesses his attorney had not called). In applying the four prong Armant test for abuse, id. at 556, the district court, in addressing the diligence and "useful purpose of the continuance" prongs, relied on Martin's assertion that his attorney had not subpoenaed two critical witnesses. But nowhere in the record is it demonstrated that the trial judge was made aware of this reason. When Martin requested to represent himself, he gave no reason.

In addressing the prejudice prong of the Armant test, the district court also asserted that the absence of the two witnesses would demonstrate prejudice. Yet, when the case was subsequently tried and Martin was represented, the witnesses were not called. There was no showing that any prejudice resulted from the





failure to call these witnesses. At best, Martin may have shown enough for an evidentiary hearing on the issue.

We reverse and vacate the writ of habeas corpus. Based upon the record before us, we affirm the Faretta error determination. But whether that error requires granting the writ is inseparably connected, on the particular facts of this case, to the denial of the motion to continue the trial. Therefore, we remand to the district court to decide whether a hearing should be held and, if there was an abuse of discretion, to re-issue the writ. If the district court determines there was no abuse of discretion in denying the motion to continue, the district court should decide what impact that has, if any, on the Faretta error.

AFFIRMED IN PART; VACATED AND REMANDED IN PART.



Note: This disposition is not appropriate for publication and may not be cited to or by the Courts of this Circuit except as provided by Ninth Circuit Rule 21.

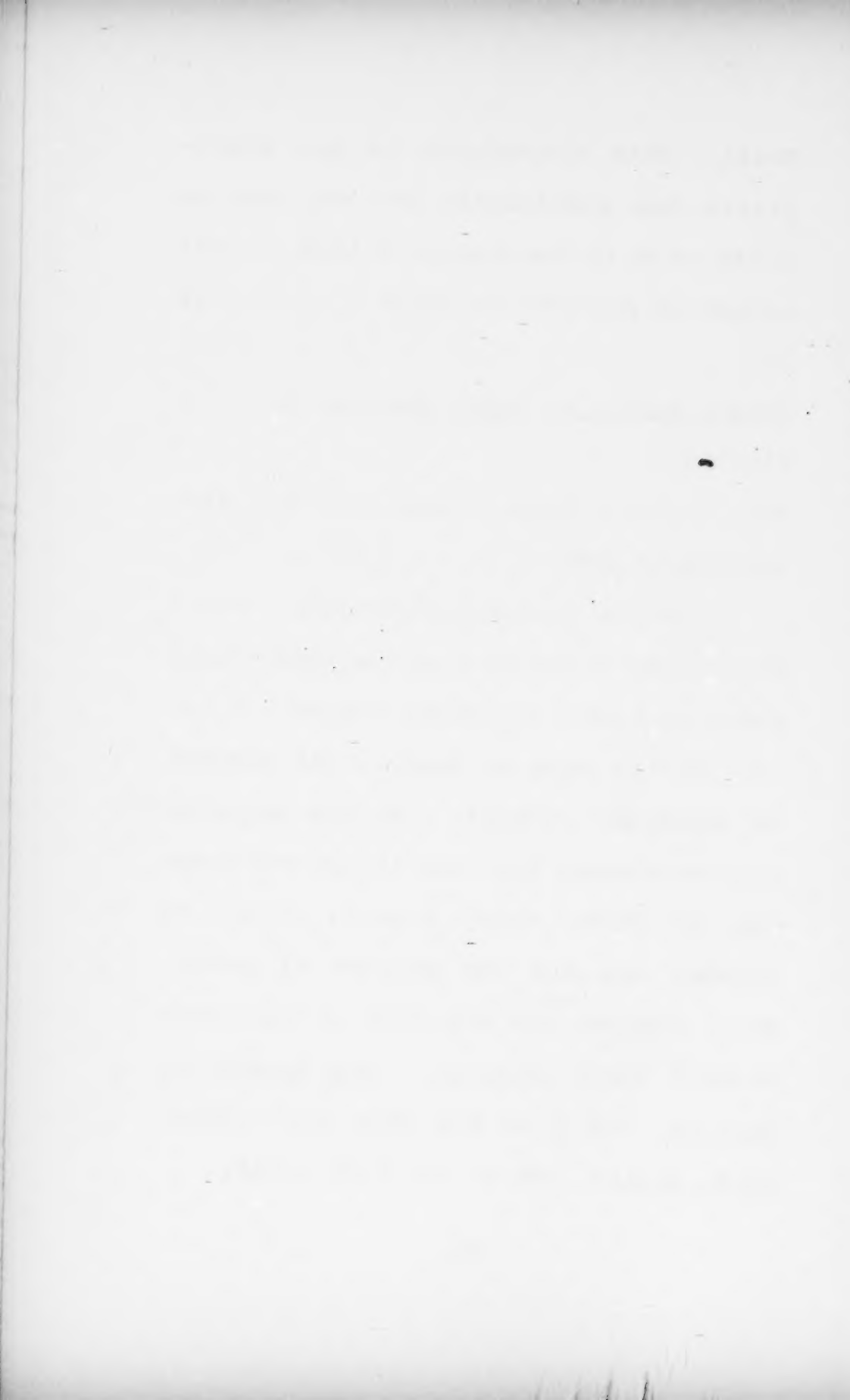
Dwight Martin v. Danny Vasquez, No.

85-6593

HUG, Circuit Judge, concurring and dissenting in part:

I write separately because I would affirm the district court's conditional grant of a writ of habeas corpus.

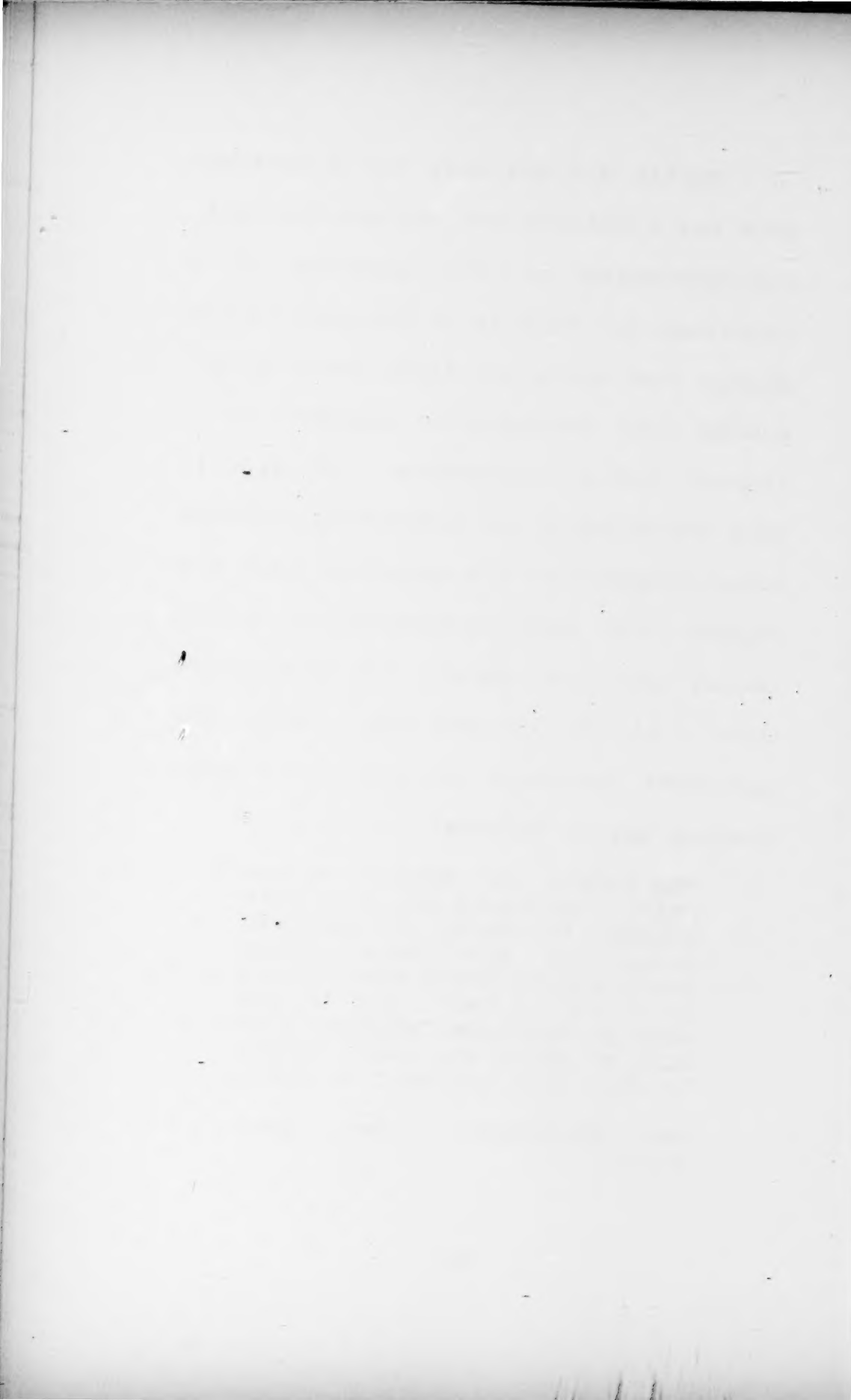
Martin made an unequivocal request to represent himself. As the majority opinion states, this was timely and there was no state court finding that the request was for the purpose of delay. Thus, Vasquez was entitled to represent himself under Faretta. See Armant v. Marquez, 772 F.2d 552 (9th Cir. 1985), cert. denied, 106 S. Ct. 1502 (1986).



Martin did not move for a continuance nor condition his request for self-representation on the granting of a continuance. This is in contrast to the Armant case where the trial court interpreted the defendant's request as a request for a continuance. On appeal, both the majority and dissenting opinions acknowledged that the defendant made his request for self-representation conditioned upon his request for a continuance. Id. at 557 and 558. Here, the pertinent exchange in the court proceeding was as follows:

**THE COURT:** Mr. Martin, do you fully understand now that this matter is ready to proceed today but that this matter would simply trail that, start in a day or two? But if you want to represent yourself, we will go ahead and start today. Is that what you want to do?

**THE DEFENDANT:** Yes, your Honor.



**THE COURT:** And you are ready to proceed today?

**THE DEFENDANT:** No, I am not.

**THE COURT:** Well, I am not going to continue the case.

**THE DEFENDANT:** You are asking me a question. I said I am not ready to proceed today.

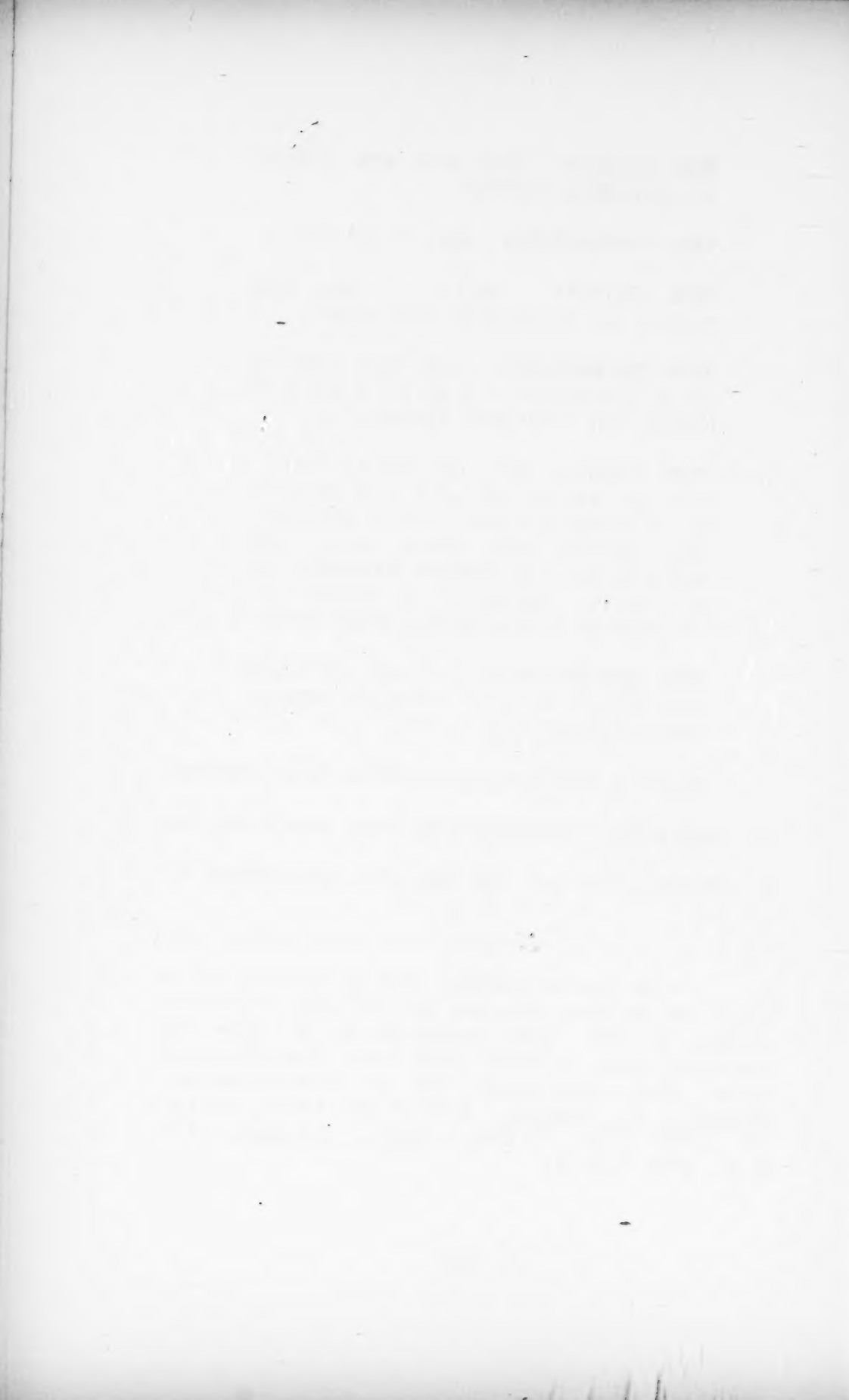
**THE COURT:** Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is untimely because I have no intent of continuing this case.

**THE DEFENDANT:** I am letting the court know I like to represent myself.

Martin did not condition his request to represent himself on the granting of a continuance.<sup>1/</sup> He merely responded to

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1/ We have upheld the granting of a writ of habeas corpus where the district judge found the petitioner's pro se request was timely and not conditioned upon the granting of a continuance. Maxwell v. Sumner, 673 F.2d 1031, 1035-36 (9th Cir. 1982), cert. denied, 459 U.S. 976 (1982).





the judge's question as to whether he was ready to proceed, stating that he was not. The judge said he was not going to continue the case. Martin then pointed out that he had merely responded to the judge's question as to whether he was ready to proceed that day. It is important to note that Martin had not conditioned his request to represent himself; in fact, he had not even requested a continuance. It was the judge who refused to let him represent himself if he did not acknowledge that he was ready to proceed that day.

Thus, Martin had a constitutional right to represent himself, which was timely made, and there was no finding that it was for the purpose of delay. The issue before us on appeal is whether he was denied that right. It is clear that he was. Had he been permitted to



represent himself and had he requested a continuance and been denied that continuance, then that would pose a different issue for us to resolve; or had he conditioned his request to represent himself on the granting of a continuance, as in Armant, we would then have to inquire into the necessity for the continuance.

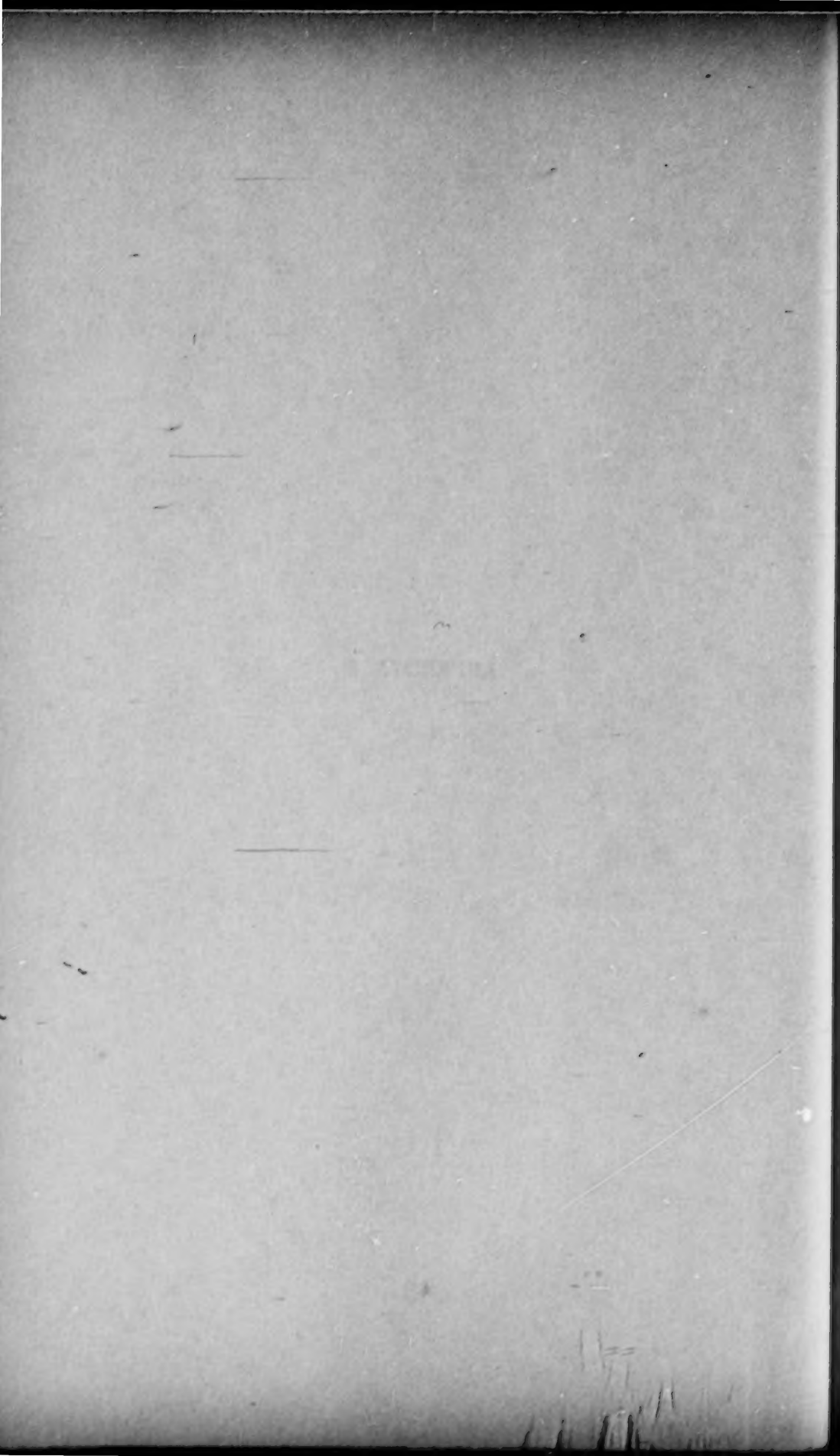
I do note that if that were the question before us, I would have no difficulty in finding that it was patently an abuse of discretion under the authority of United States v. Flynt, 756 F.2d 1352 (9th Cir. 1984) to fail to grant at least the seven-day continuance granted to his attorney. The need for a continuance to obtain the file (which his attorney had not even brought to court that day) and prepare himself to take over his defense is so obvious that the need to express specific reasons seems



superfluous. The fact that a seven-day continuance was, in fact, granted obviates any argument based on inconvenience to the court from the seven-day delay.



## APPENDIX B





NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DWIGHT EDWARD MARTIN,	)	No. 87-6424
	)	
Petitioner-Appellee,	)	D.C. No.
	)	CV-85-1732
v.	)	
	)	
DANNY VASQUEZ, Warden,	)	MEMORANDUM*
	)	
Respondent-Appellant.)	)	

---

Appeal from the United States District  
Court for the Central District of  
California Robert M. Takasugi,  
District Judge, Presiding

Argued and Submitted: May 4, 1989  
Pasadena, California

Before: SNEED, REINHARDT, and BRUNETTI,  
Circuit Judges

Warden Vasquez appeals the grant of  
a writ of habeas corpus. We affirm.

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\* This disposition is not appropriate  
for publication and may not be cited to  
or by the courts of this circuit except  
as provided by 9th Cir. Rule 36-3.



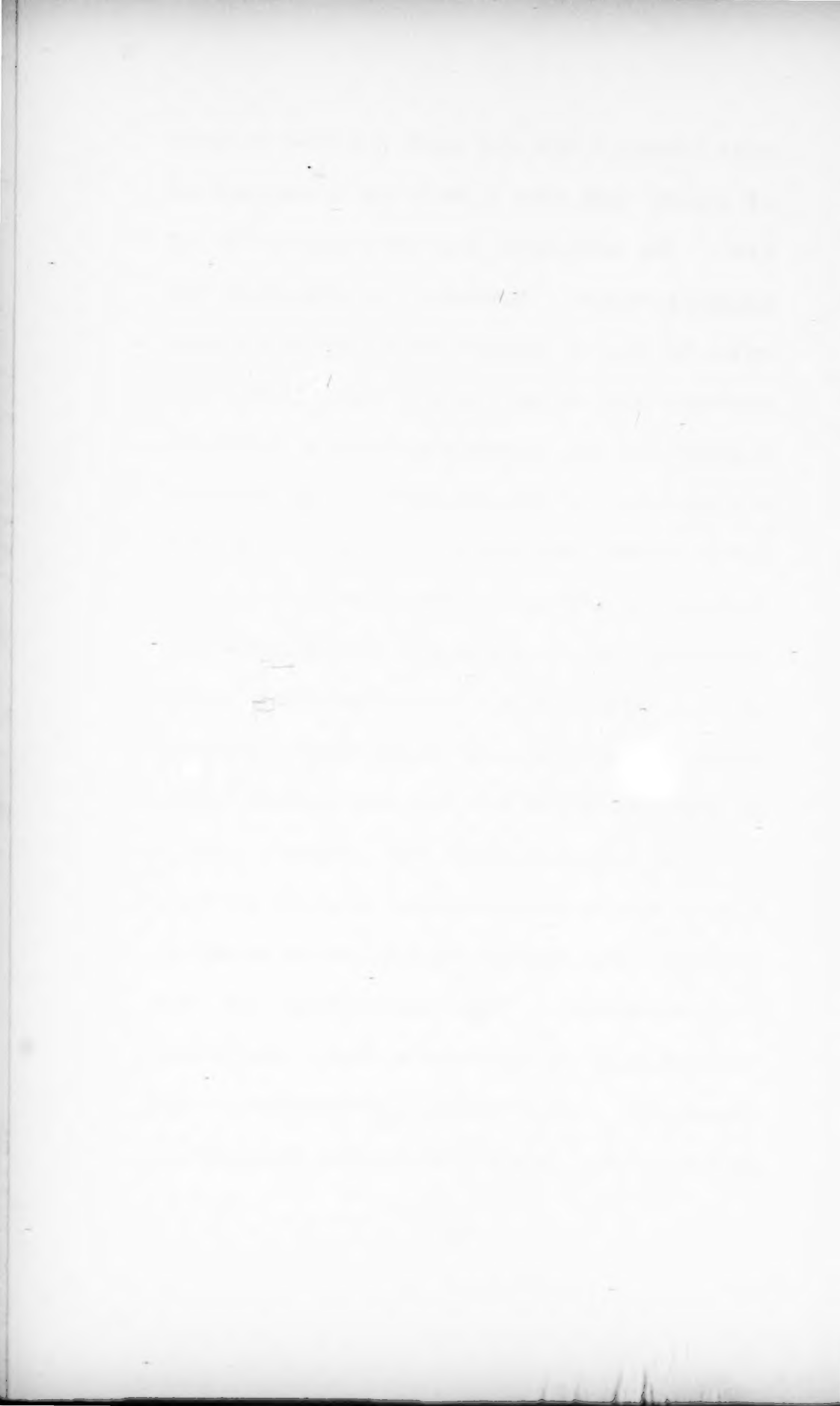
On April 28, 1981, the scheduled date of his murder trial, Martin informed the court that he was displeased with the representation provided by counsel. Appellee asserted that he had just learned that counsel had failed to subpoena two crucial defense witnesses. Martin then claimed his Faretta right to self-representation. The trial court denied him that right, ruling that the motion was untimely. The court also found that "Martin was not prepared to go to trial that day." Memo. Dispo. at 2. The court ordered the case to trail defense counsel's other case, and the trial commenced seven days later.

Martin sought a writ of habeas corpus in federal court. The district court issued the writ, and the government appealed. In an unpublished memorandum, we held that Martin's request to repre-



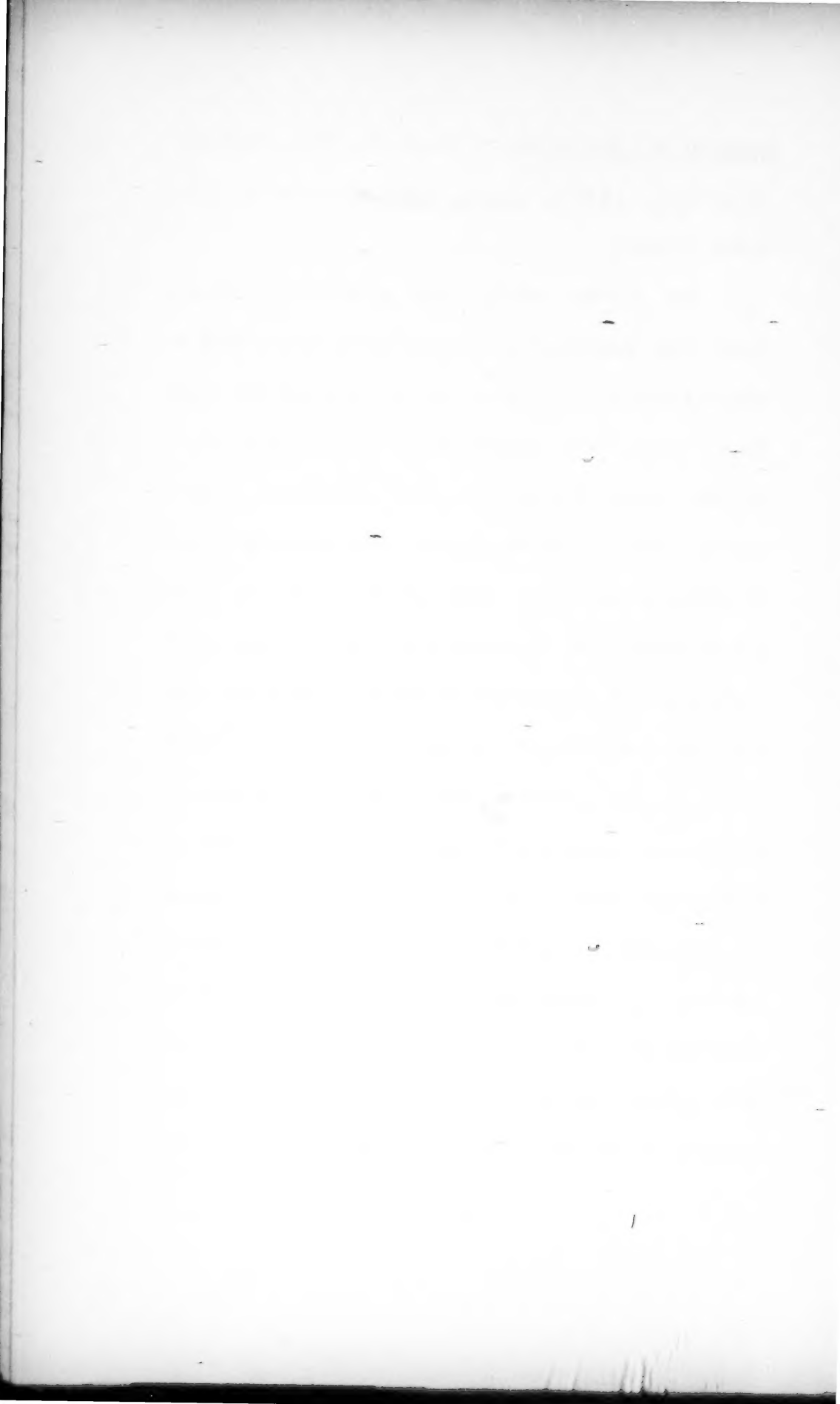
sent himself was not made for the purpose of delay and was timely as a matter of law. We affirmed the determination of Faretta error. However, we remanded the case to the district court to determine whether the trial court had abused its discretion in denying Martin's implicit motion for a continuance. On remand, both sides declined to introduce any further evidence. The district court, adopting the findings and recommendations of the magistrate, held that the trial court had abused its discretion, and the government appealed for the second time.

In considering the denial of a motion for a continuance, we look to four factors: the degree of diligence shown by the defendant; the usefulness of the continuance to the defendant; inconvenience to the court, witnesses, and parties; and prejudice to the defendant.



Armant v. Marquez, 772 F.2d 552, 556-57 (9th Cir. 1985), cert. denied, 106 S. Ct. 1502 (1986).

We agree with the district court that the factors in this case required a continuance. First, as evidenced by the fact that the case did not start for seven more days, it is apparent that there would have been no substantial inconvenience to the court or to the government as a result of affording the defendant a reasonable delay. Second, on the record before us (and bearing in mind that it is uncontested that no improper purpose underlay appellee's request), appellee exercised reasonable diligence in requesting the right to self-representation. Concededly, the source of his discontent with counsel did not arise until the day of trial. Third, the continuance would have been useful since it





would have permitted Martin to obtain the case file (which was not even in court on the day of trial) and prepare his defense. As noted earlier, we have previously concluded that Martin was not prepared to go to trial on the day in question. Finally, the defendant was prejudiced since the failure to grant a continuance effectively deprived him of the opportunity to exercise his requested constitutional right to self-representation. Id. at 557. In Armant, we strongly indicated that this was sufficient. Id. Moreover, Martin alleges that granting the continuance would have enabled him to present two witnesses at trial who might have substantially aided his defense. The government failed to seek an evidentiary hearing at which it could challenge any of appellee's claims. In light of all of the above, we agree

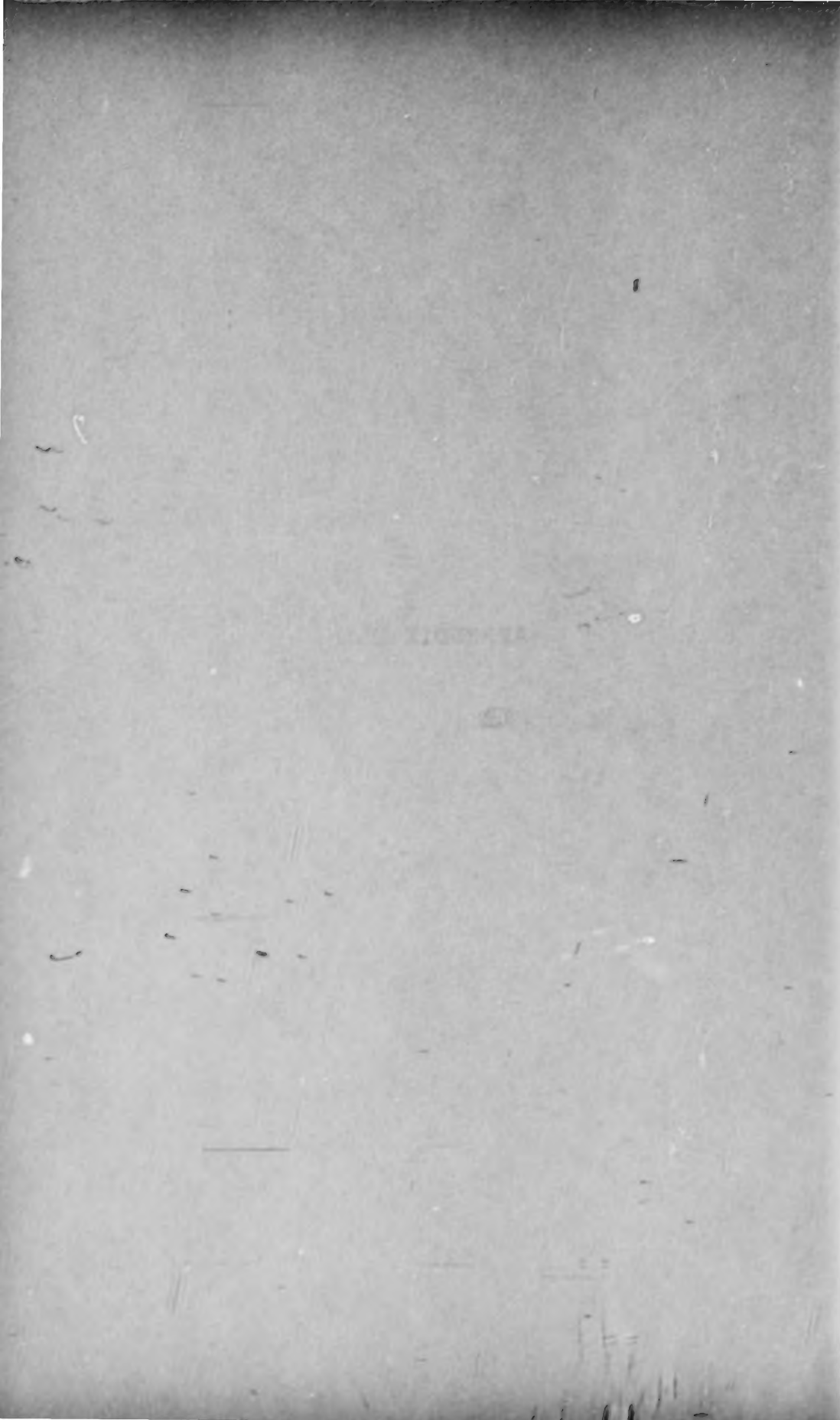


with both the district court and the magistrate that the trial court abused its discretion in denying the continuance.

The grant of the writ of habeas corpus is AFFIRMED.



## APPENDIX C

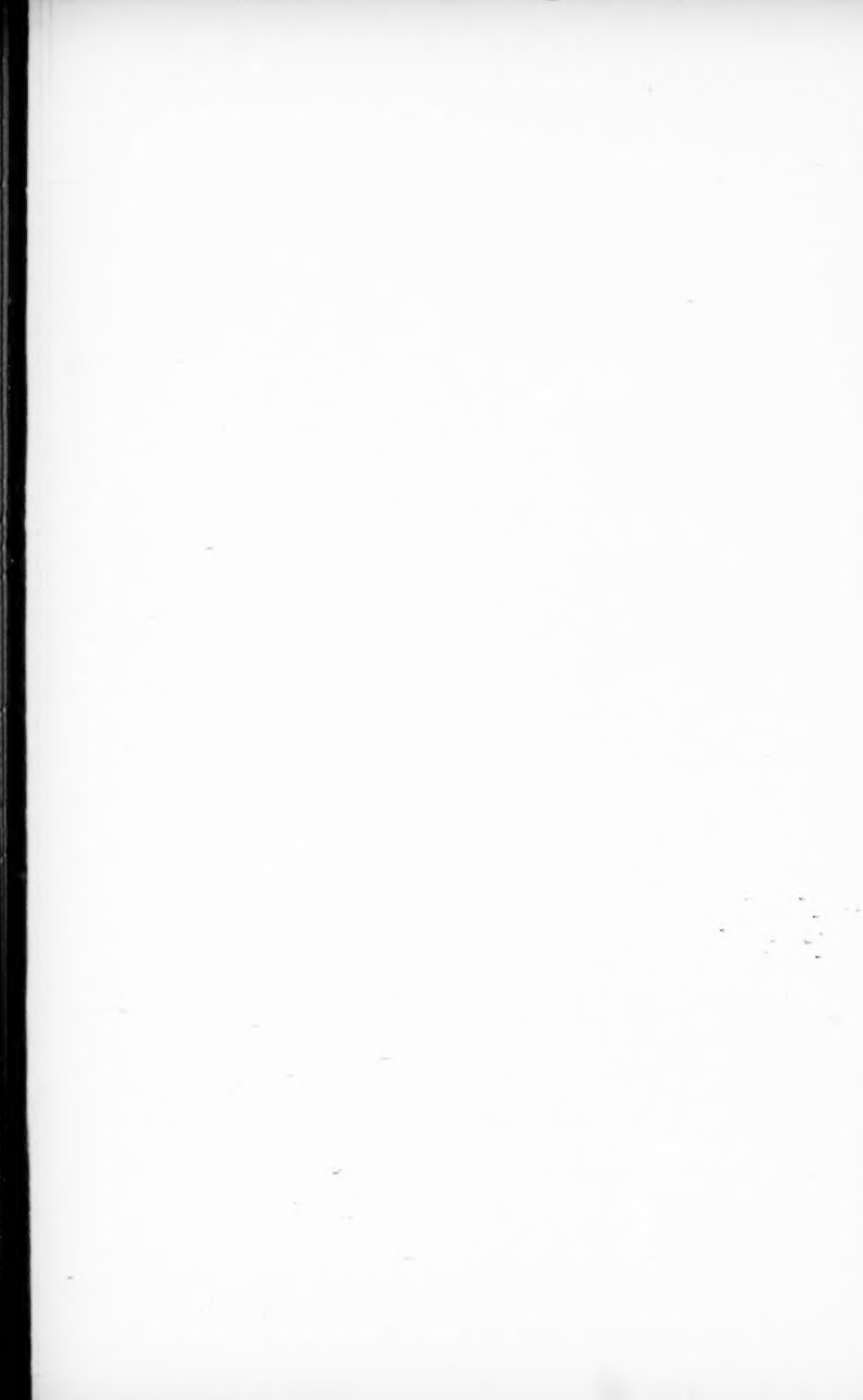


NOT FOR PUBLICATION  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DWIGHT EDWARD MARTIN,	)	No. 87-6424
	)	
Petitioner-Appellee,	)	D.C. No.
	)	CV-85-1732
v.	)	
	)	
DANNY VASQUEZ, Warden,	)	O R D E R
	)	
Respondent-Appellant.)	)	
<hr/>		

Before: SNEED, REINHARDT, and BRUNETTI,  
Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b). The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.





**APPENDIX D**



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN,	)	NO. CV 85-
	)	1732-RMT (JR)
Petitioner,	)	
	)	JUDGMENT
v.	)	GRANTING A
	)	CONDITIONAL WRIT
DANNY VASQUEZ, WARDEN,	)	OF HABEAS CORPUS
	)	
Respondent.	)	

---

Pursuant to the Order of the Court  
adopting the findings, conclusions and  
recommendations of the United States  
Magistrate,

IT IS ADJUDGED that:

1. Petitioner was convicted by the  
State of California in violation of the  
Constitution of the United States.

2. The petitioner is entitled to a  
writ of habeas corpus from this Court,  
and that the writ will issue unless the  
State of California shall, within 60 days  
from the date of the Judgment becomes



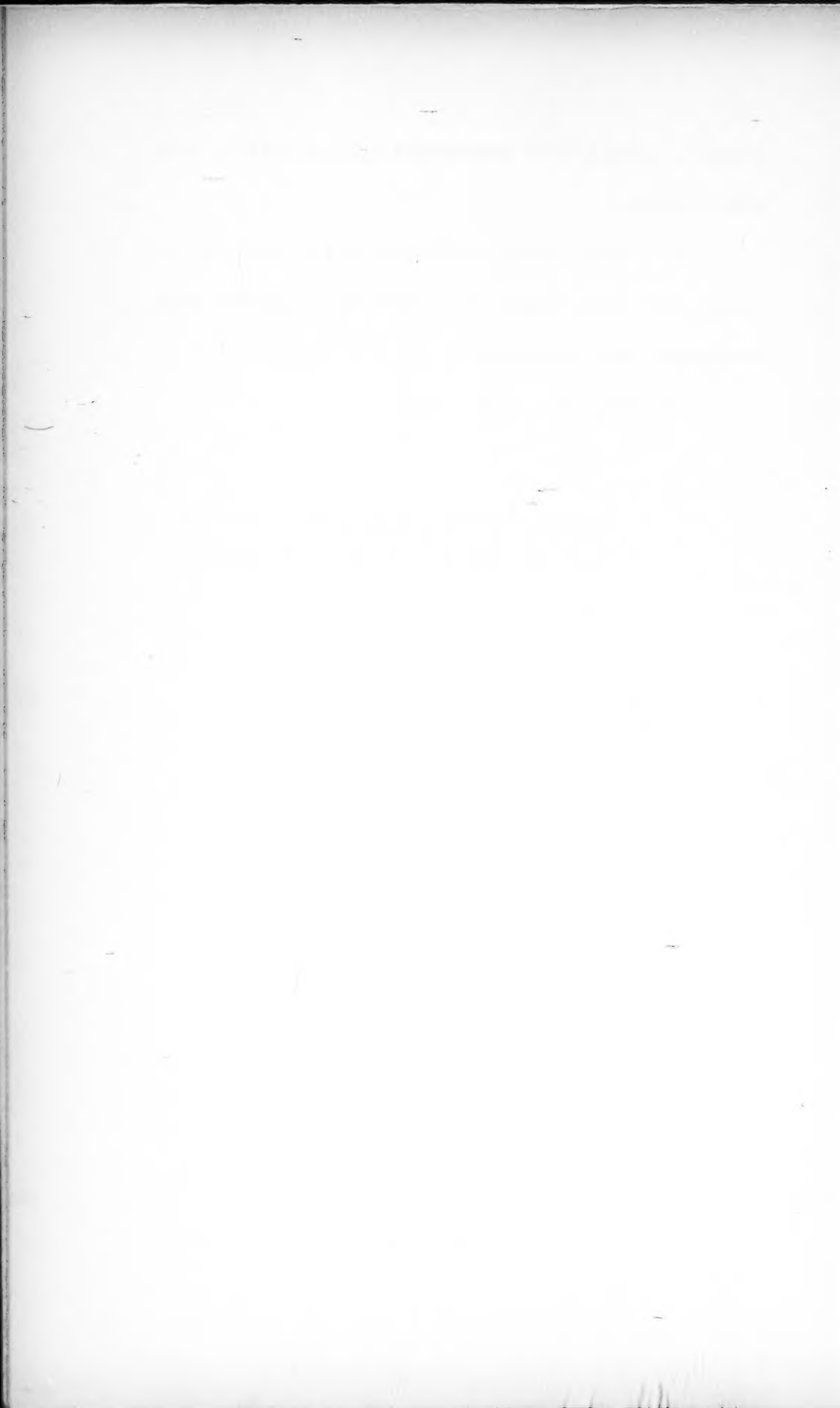
final, institute proceedings to retry the petitioner.

3. The Court retains full jurisdiction of the case to modify, amend and enforce the Judgment.

DATED: 31 AUG 1987

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ROBERT M. TAKASUGI  
United States District Judge



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

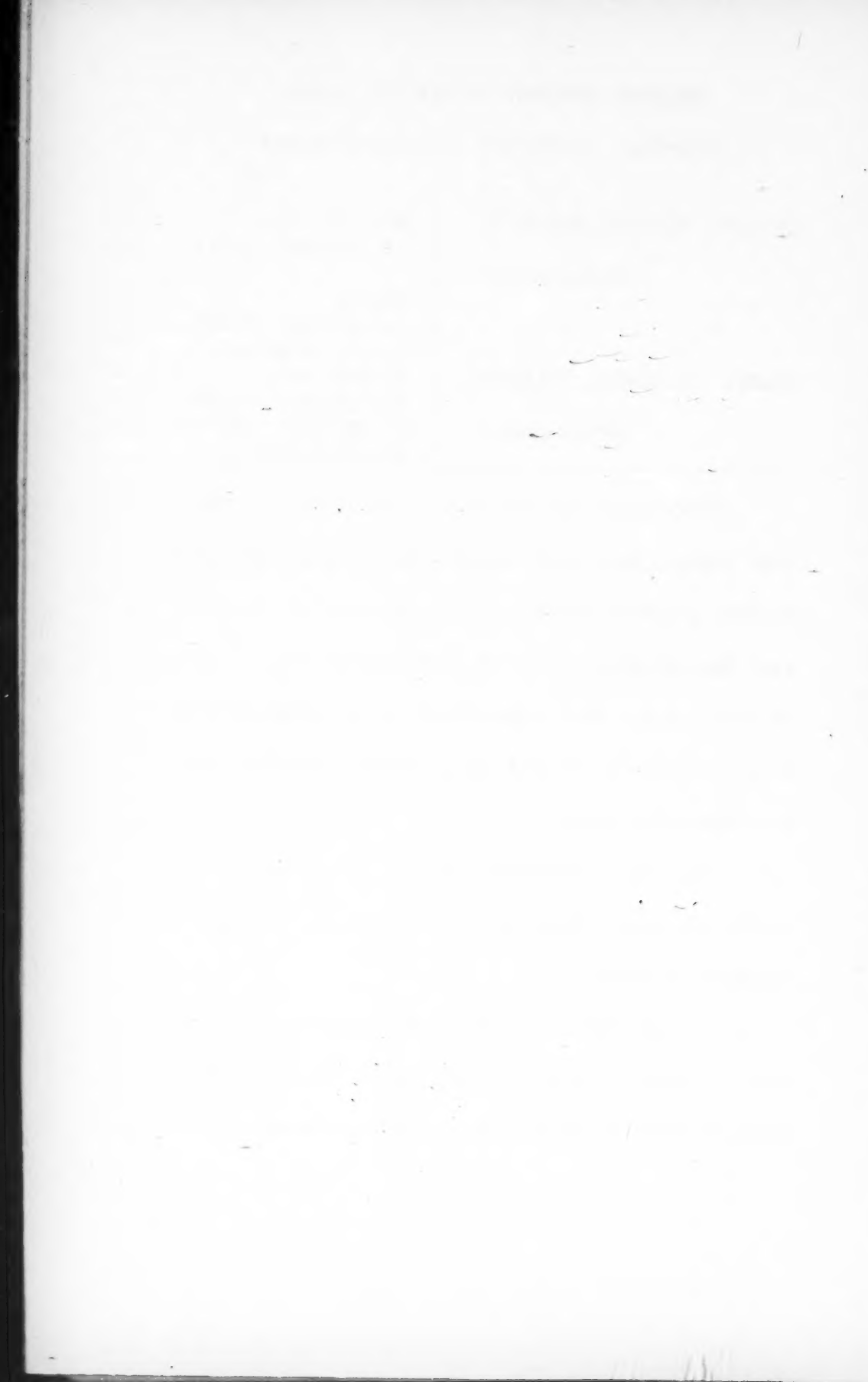
DWIGHT EDWARD MARTIN,	)	NO. CV 85-
	)	1732-RMT (JR)
Petitioner,	)	
	)	ORDER
v.	)	ADOPTING FIND-
	)	INGS, CONCLU-
DANNY VASQUEZ, WARDEN,	)	SIONS AND
	)	RECOMMENDATIONS
Respondent.	)	OF UNITED STATES
	)	MAGISTRATE

---

Pursuant to 28 U.S.C. §636(b)(1)(B), the Court has reviewed the pleadings and other papers herein, the attached Report and Recommendation of the Magistrate, the objections, and approves and adopts the Magistrate's findings, conclusions and recommendations.

IT IS ORDERED that Judgment be entered granting a conditional writ of habeas corpus.

IT IS FURTHER ORDERED that the Clerk shall serve copies of this Order, the Magistrate's Reports and Recommendations





and the Judgment by United States mail on  
the petitioner and the Office of the  
Attorney General for the State of  
California.

DATED: 31 AUG 1987

---

ROBERT M. TAKASUGI  
United States District Judge



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN,	)	NO. CV 85-
	)	1732-RMT (JR)
Petitioner,	)	
	)	FINAL
v.	)	REPORT AND
	)	RECOMMENDATION
DANNY VASQUEZ, WARDEN,	)	
	)	
Respondent.	)	
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This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On August 5, 1987, the Clerk filed a Notice of Filing of Magistrate's Report and Recommendation and Lodging of Proposed Judgment, which was served on the



parties, together with copies of the Magistrate's Report and Recommendation.

Objections were filed on August 17, 1987.

It is therefore the final recommendation of the Magistrate that an Order be issued by the Court (1) approving and adopting the Report and Recommendation and 2) directing that Judgment be entered granting a conditional writ of habeas corpus.

DATED: August 24, 1987.

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JOSEPH REICHMANN  
United States Magistrate



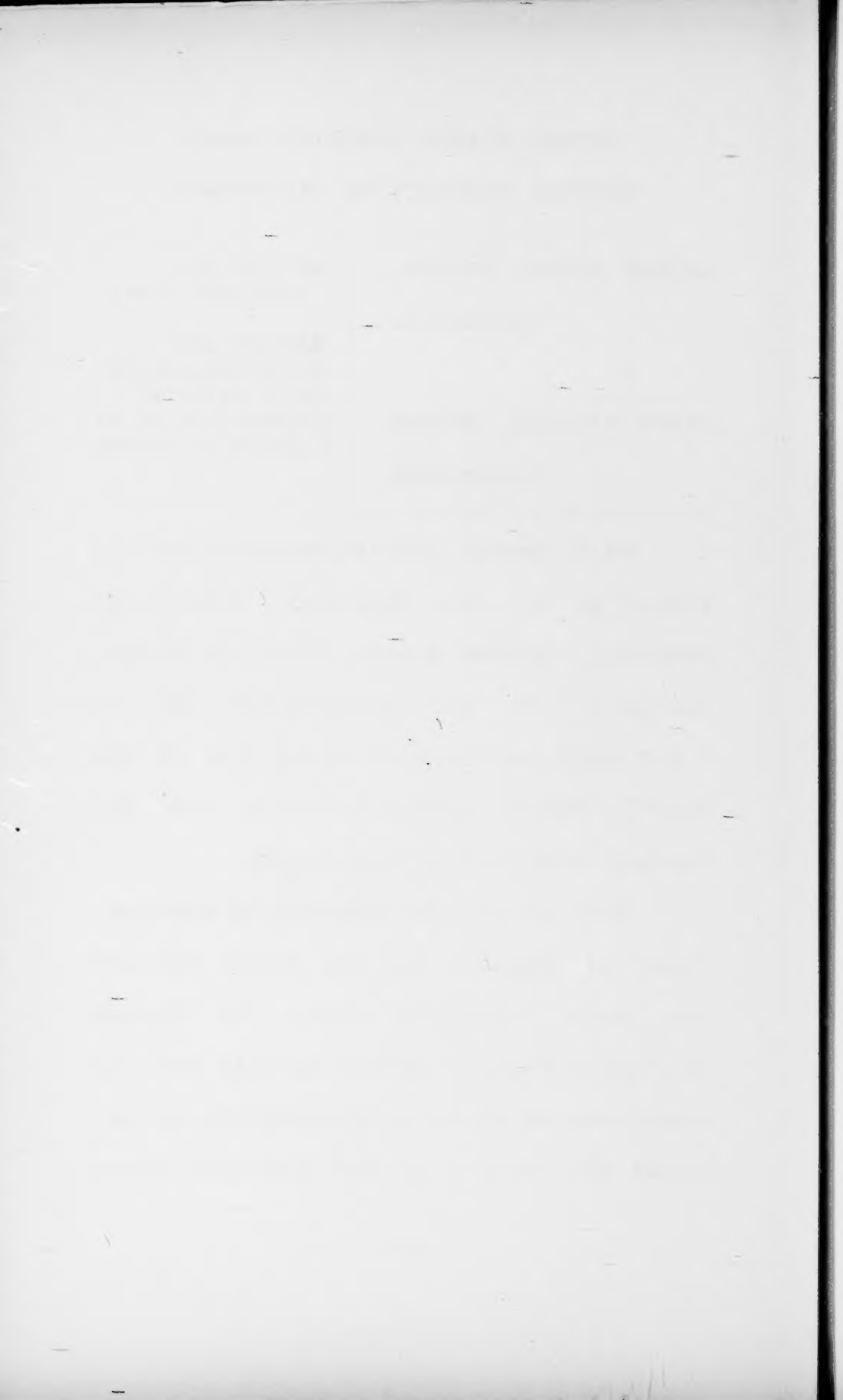
UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN,	)	NO. CV 85-
	)	1732-RMT (JR)
Petitioner,	)	
	)	REPORT AND
v.	)	RECOMMENDATION
	)	ON A WRIT OF
DANNY VASQUEZ, WARDEN,	)	HABEAS CORPUS BY
	)	A STATE PRISONER
Respondent.	)	
	)	

---

This Report and Recommendation is submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to the provisions of 28 U.S.C. §636 and General Order 194 of the United States District Court for the Central District of California.

This matter was remanded by the U.S. Court of Appeals for the Ninth Circuit for this "district court to decide whether a hearing should be held and, if there was an abuse of discretion, to re-issue the writ. If the district court



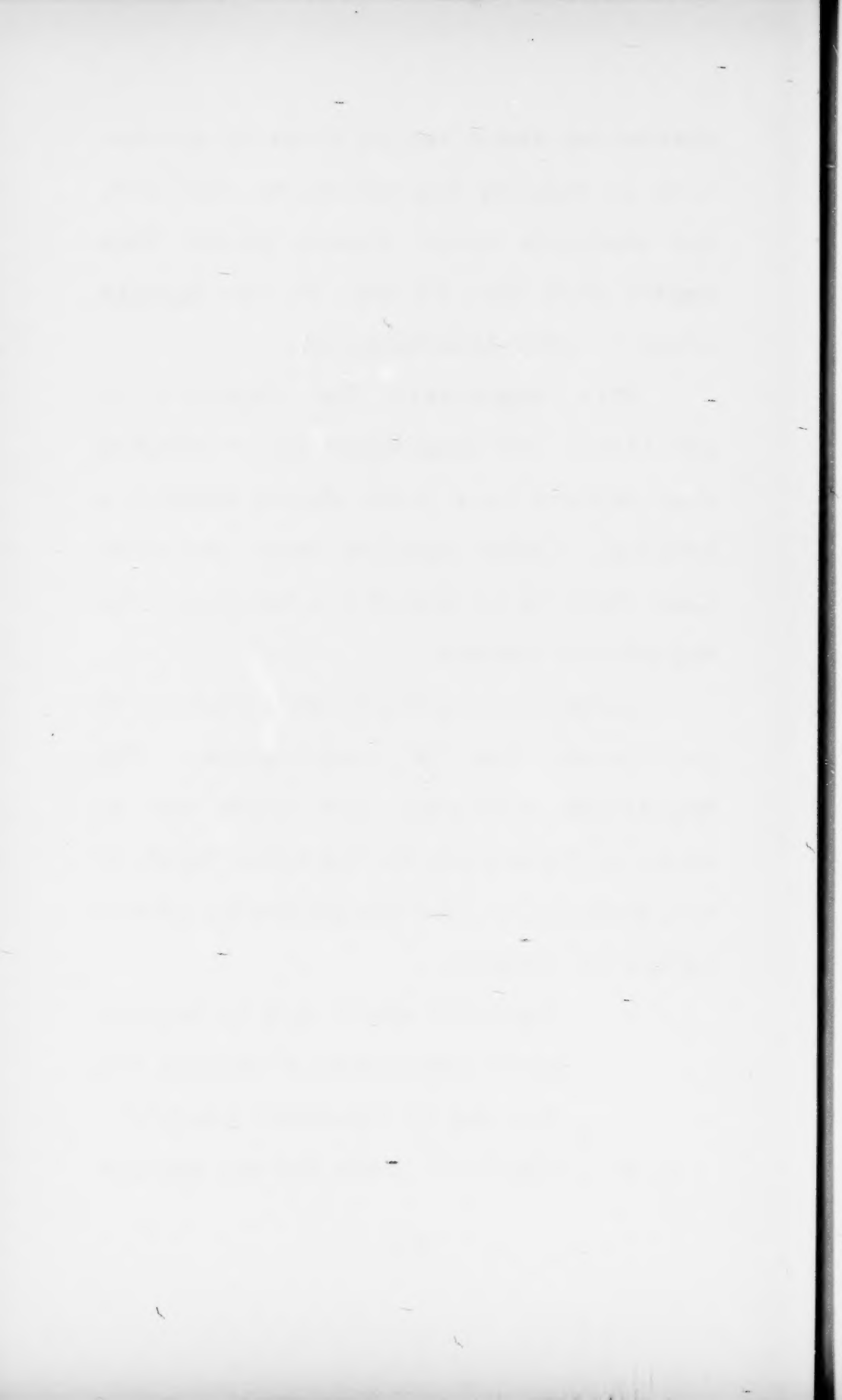


determines there was no abuse of discretion in denying the Motion to Continue, the district court should decide what impact that has, if any, on the Faretta error." (See Attachment A).

This Magistrate has inquired of petitioner and respondent as to whether they believe this Court should conduct a hearing. Both parties have indicated that there is no need for a hearing. The Magistrate concurs.

Assuming that there was a request by petitioner for a continuance, the Magistrate concludes that there was an abuse of discretion by the trial judge in not granting it for the following combination of reasons:

1. The trial court made no inquiry as to petitioner's reasons for wanting to represent himself,
2. The trial judge did not inquire



of petitioner as to his reason for not being able to proceed immediately (his counsel was not able to proceed immediately, either). The judge did not inquire as to whether petitioner could have proceeded on the next day or just how long a continuance he was seeking, and

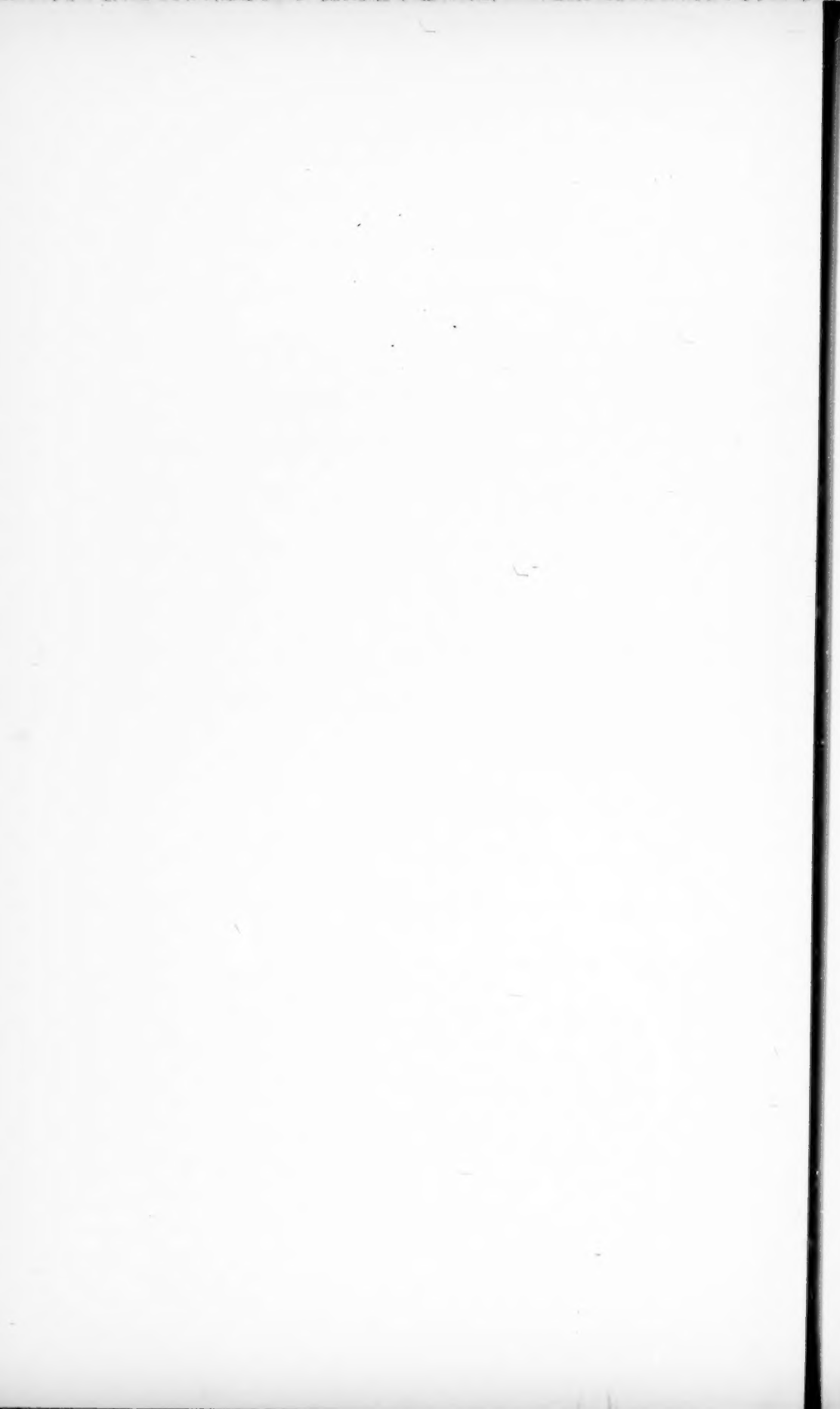
3. The trial did not actually commence until seven days after petitioner had made his request.

The Magistrate finds an abuse of discretion and THEREFORE RECOMMENDS that this Court re-issue the writ.

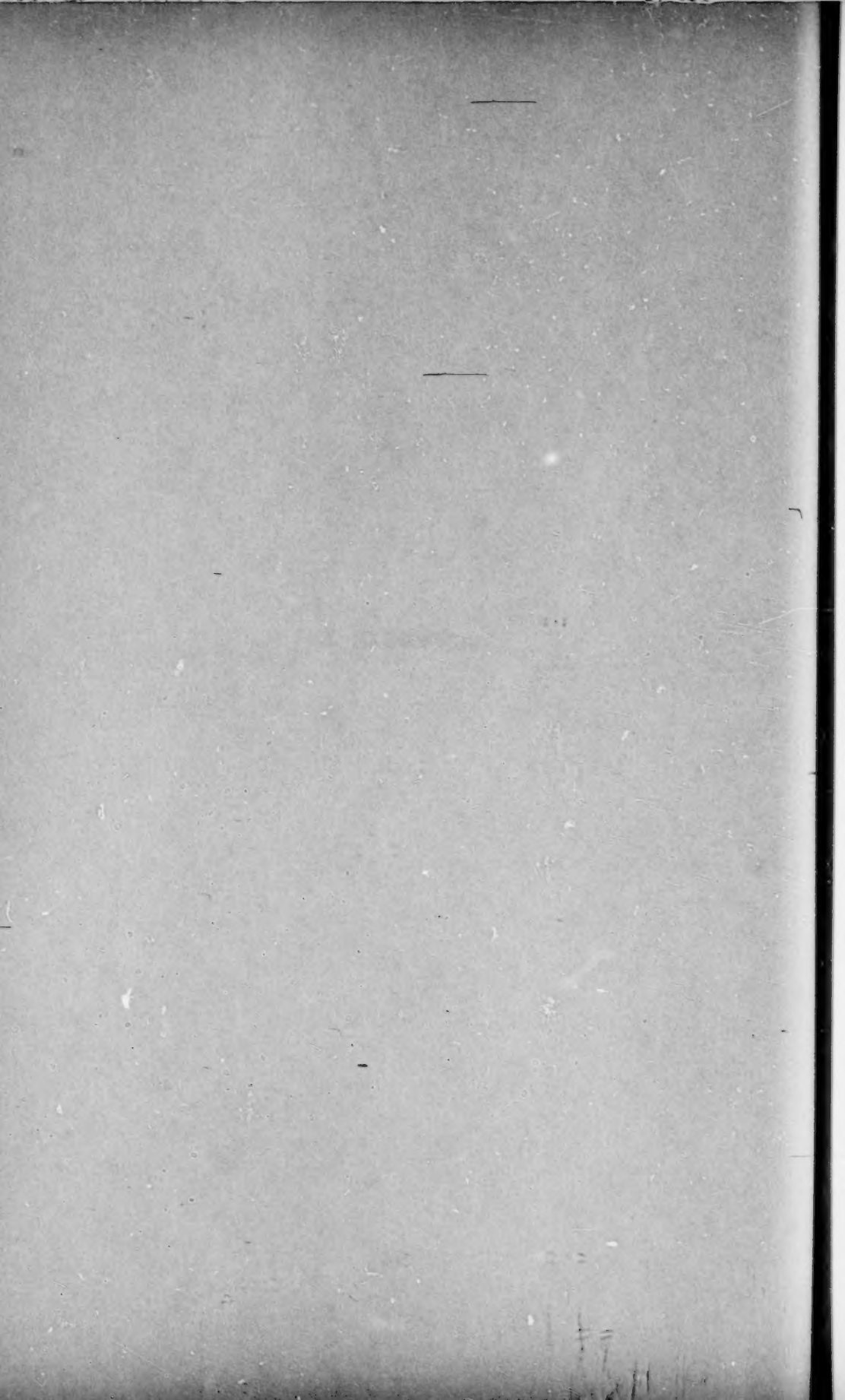
DATED: August 5, 1987.

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JOSEPH REICHMANN  
United States Magistrate



## APPENDIX E



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

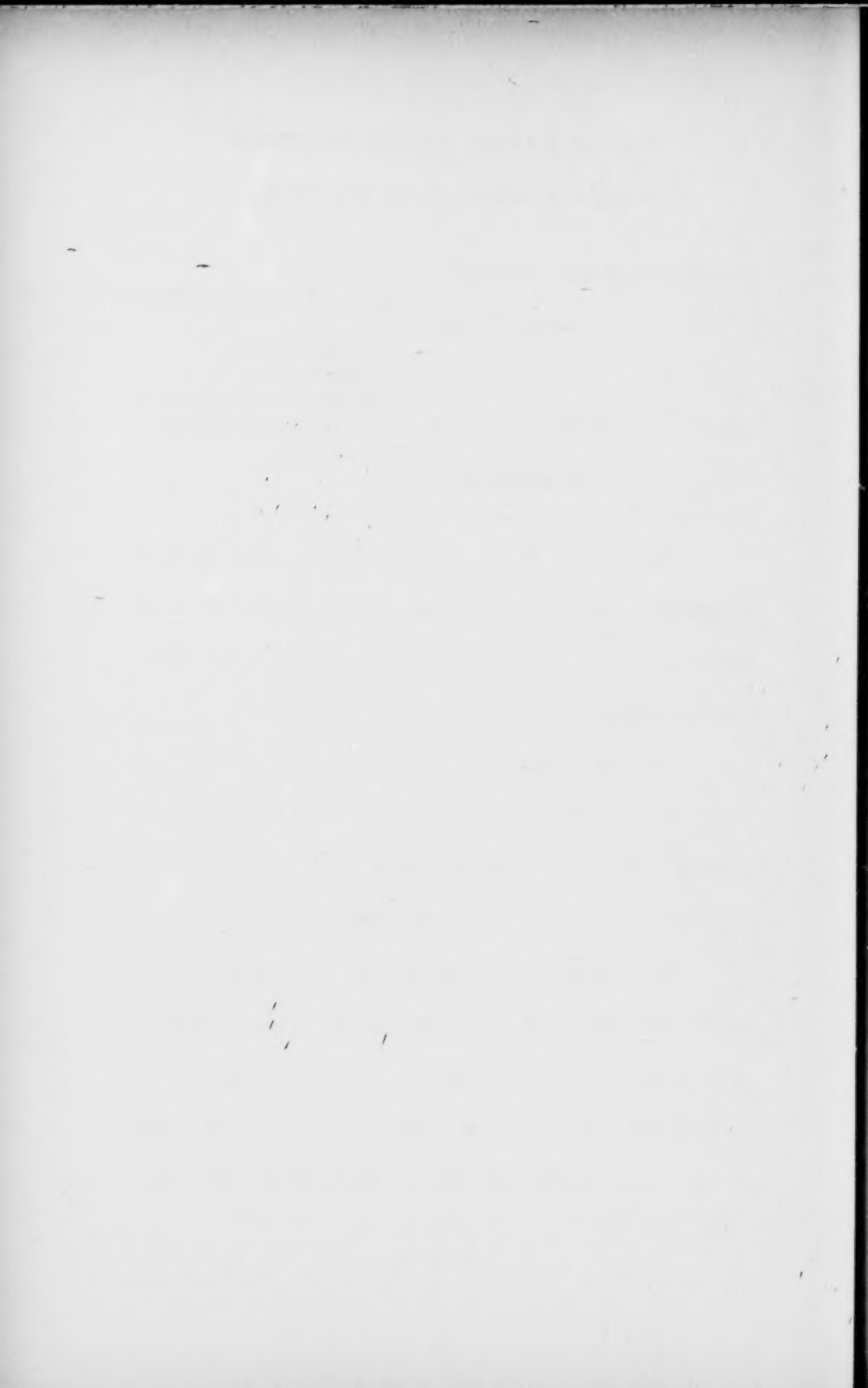
DWIGHT EDWARD MARTIN,	)	NO. CV 85-
	)	1732-RMT (JR)
Petitioner,	)	
	)	JUDGMENT
v.	)	GRANTING A
	)	CONDITIONAL WRIT
DANNY VASQUEZ, WARDEN,	)	OF HABEAS CORPUS
	)	
Respondent.	)	
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Pursuant to the Order of the Court  
adopting the findings, conclusions and  
recommendations of the United States  
Magistrate,

IT IS ADJUDGED that: -

1. Petitioner was convicted by the  
State of California in violation of the  
Constitution of the United States.

2. The petitioner is entitled to a  
writ of habeas corpus from this Court,  
and that the writ will issue unless the  
State of California shall, within 60 days  
from the date ~~of~~ this Judgment becomes





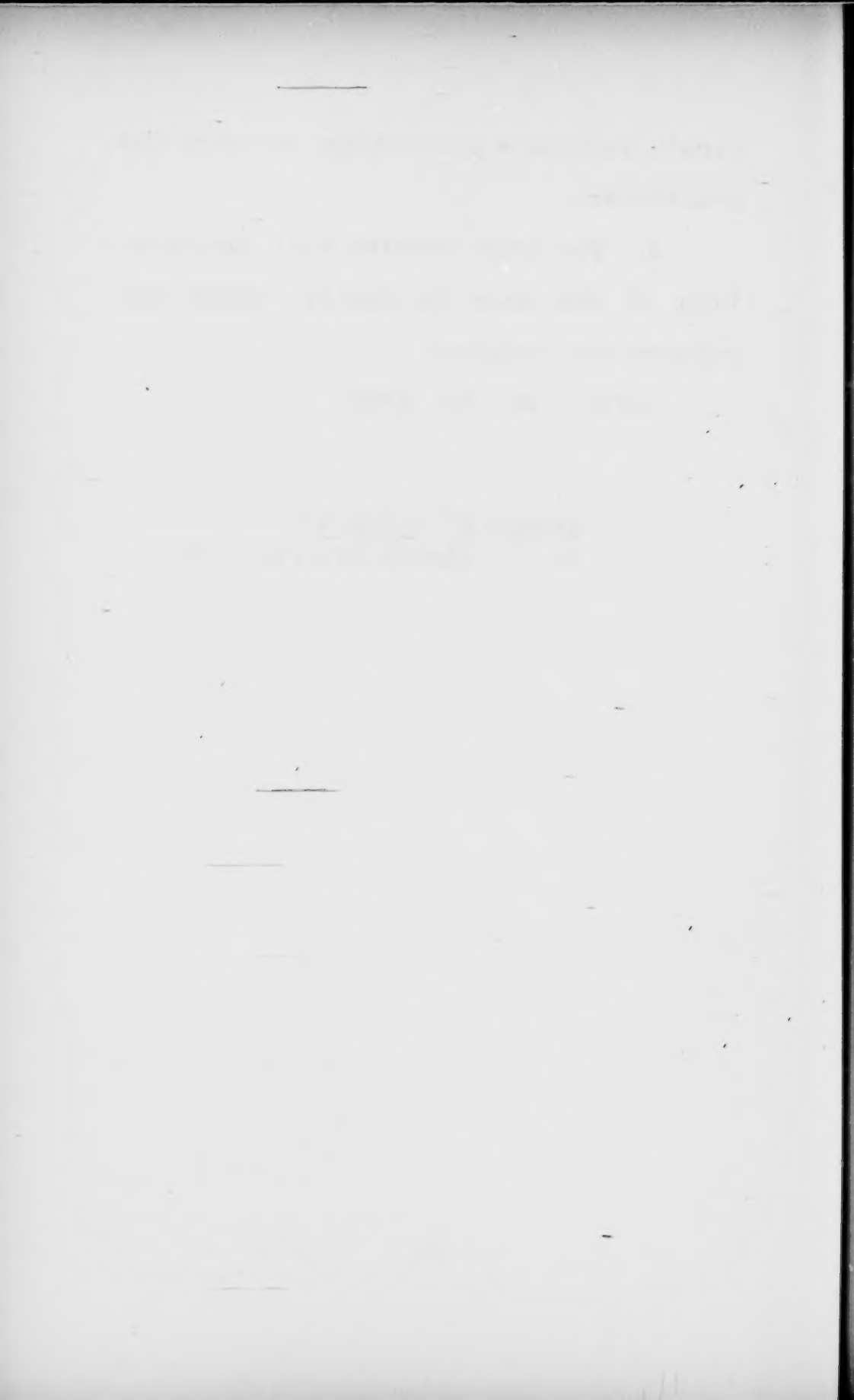
final, institute proceedings to retry the petitioner.

3. The Court retains full jurisdiction of the case to modify, amend and enforce the Judgment.

DATED: Nov 10, 1985

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ROBERT M. TAKASUGI  
United States District Judge

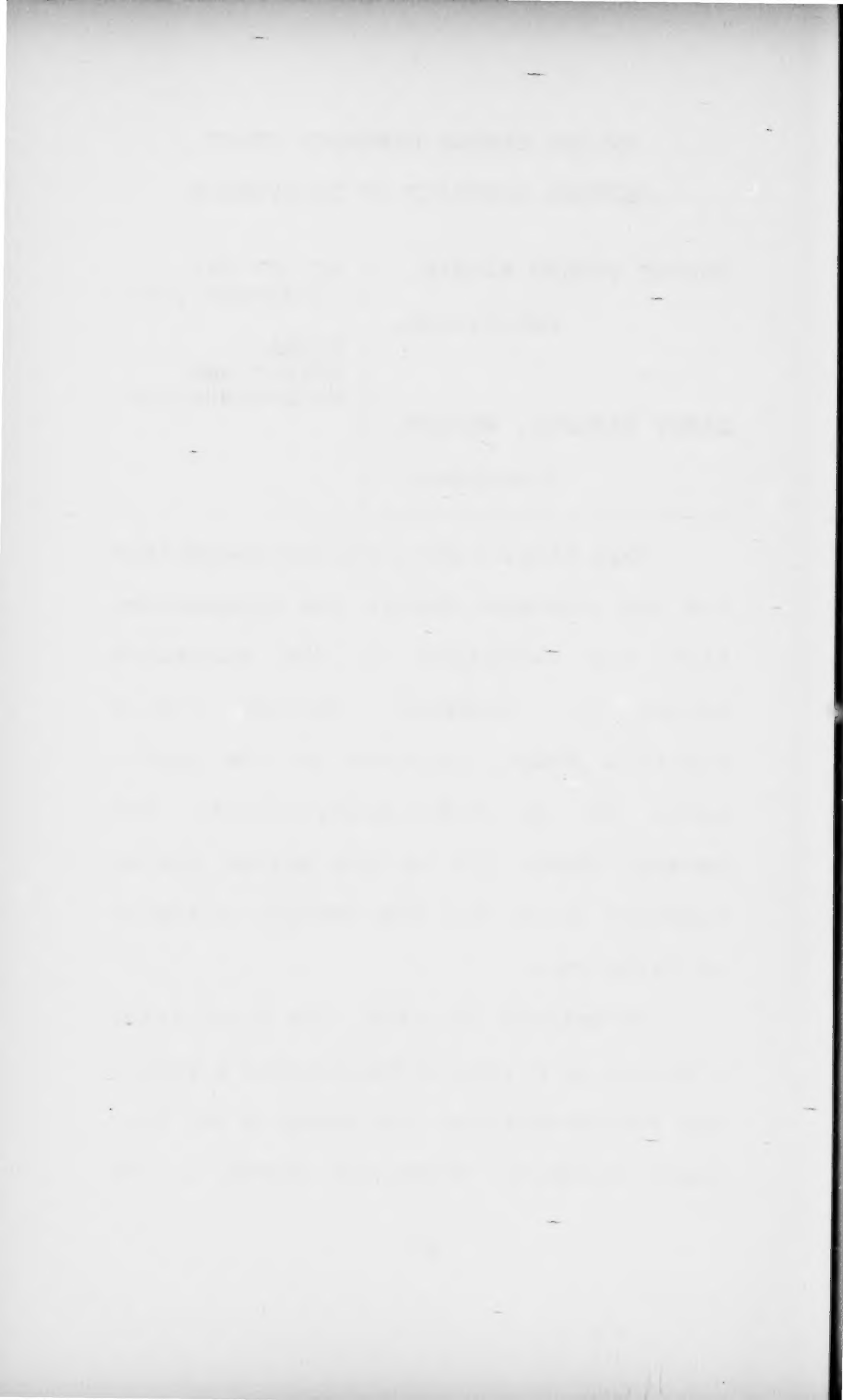


UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN,	)	NO. CV 85-
	)	1732-RMT (JR)
Petitioner,	)	
	)	FINAL
v.	)	REPORT AND
	)	RECOMMENDATION
DANNY VASQUEZ, WARDEN,	)	
	)	
Respondent.	)	
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This Final Report and Recommendation and the attached Report and Recommendation are submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and General Order 194 of the United States District Court for the Central District of California.

On October 28, 1985, the Clerk filed a Notice of Filing of Magistrate's Report and Recommendation and Lodging of Proposed Judgment, which was served on the



parties, together with copies of the Magistrate's Report and Recommendation.

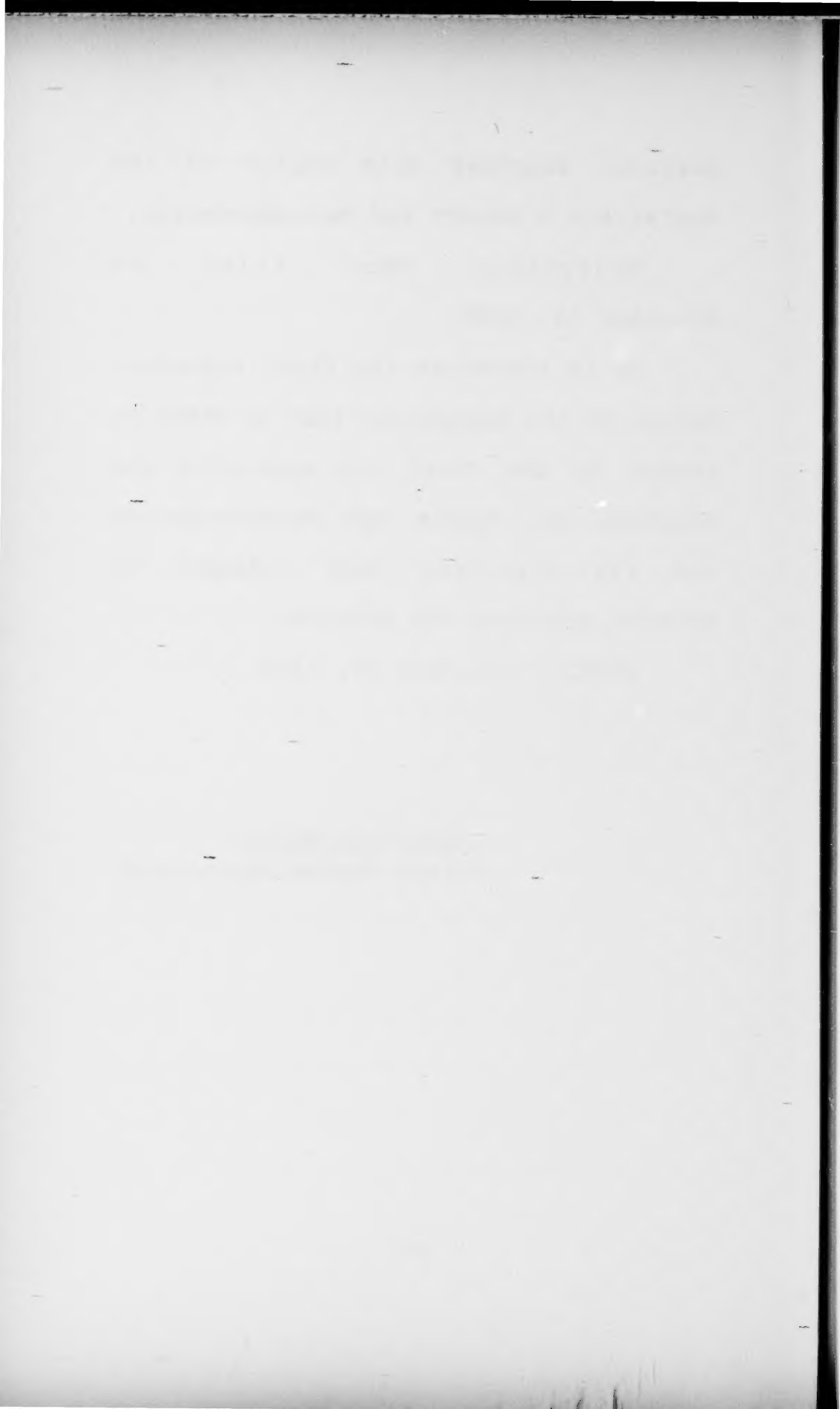
Objections were filed on November 14, 1985.

It is therefore the final recommendation of the Magistrate that an Order be issued by the Court (1) approving and adopting the Report and Recommendation and (2) directing that Judgment be entered granting the petition.

DATED: November 15, 1985.

---

JOSEPH REICHMANN  
United States Magistrate



UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

DWIGHT EDWARD MARTIN,	)	NO. CV 85-
	)	1732-RMT (JR)
Petitioner,	)	
	)	REPORT AND
v.	)	RECOMMENDATION
	)	ON A WRIT OF
DANNY VASQUEZ, WARDEN,	)	HABEAS CORPUS BY
	)	A STATE PRISONER
Respondent.	)	
<hr/>		)

This Report and Recommendation is submitted to the Honorable Robert M. Takasugi, United States District Judge, pursuant to the provisions of 28 U.S.C. §636 and General Order 194 of the United States District Court for the Central District of California.

THE PETITION

Dwight Edward Martin petitions the Court for a writ of habeas corpus. In his petition, Martin alleges that his Sixth Amendment right to self-representation was violated by the California

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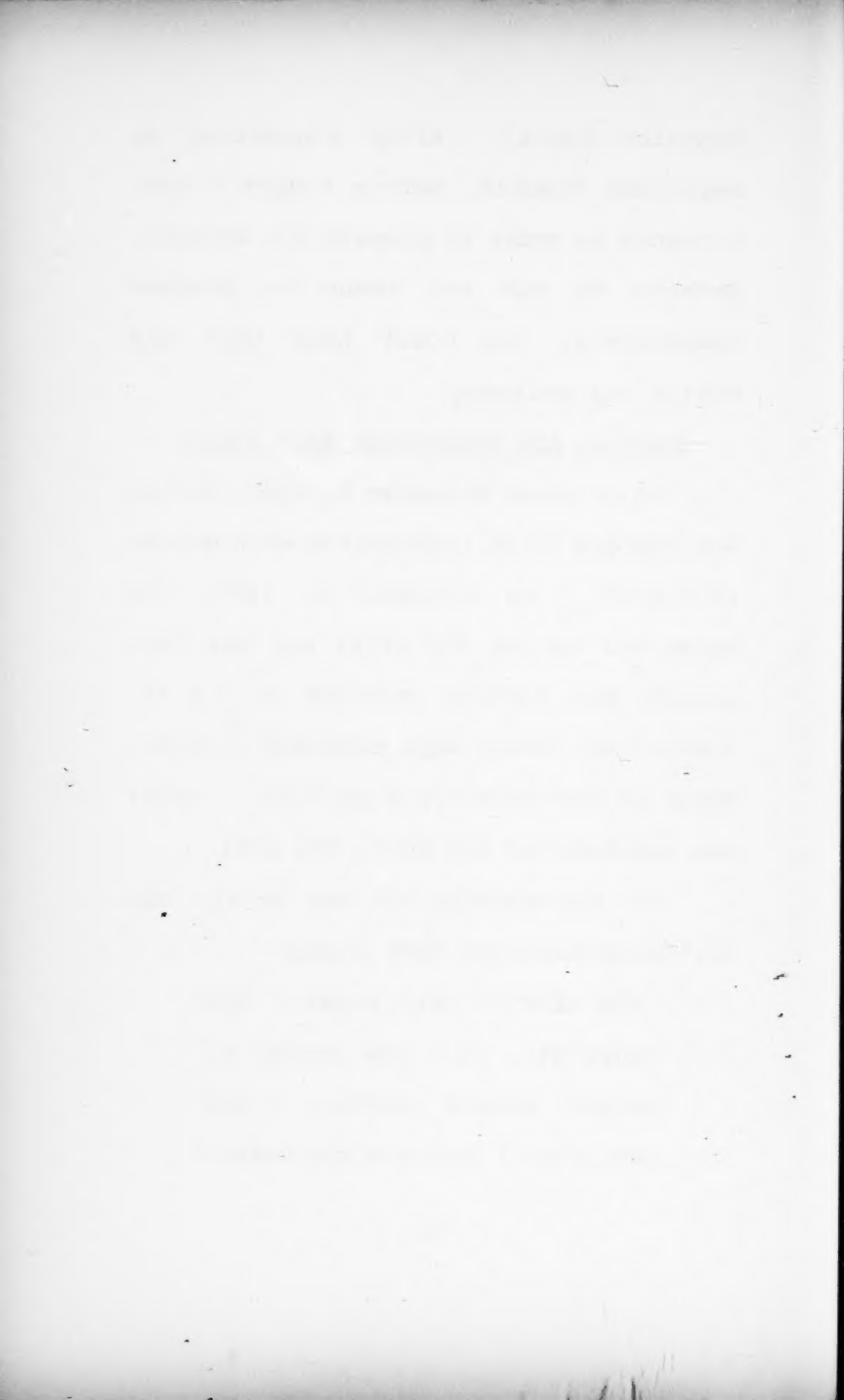
Superior Court. After requesting to represent himself, Martin sought a continuance in order to prepare his defense. Because he was not ready to proceed immediately, the Court held that his motion was untimely.

#### FACTUAL AND PROCEDURAL BACKGROUND

On or about November 5, 1980, Martin was charged in an information with murder (C.T.p.1). On December 5, 1980, the cause was called for trial and was continued for further motions (C.T.p.4). Thereafter, there were numerous continuances of the trial (C.T.pp.7-18). Trial was rescheduled for April 28, 1981.

On the morning of the trial, the following exchange took place:

"THE COURT: All right. The court will call the matter of Dwight Edward Martin. The record will indicate the defen-



dant is present with counsel;  
People are present.

MR. GOLDSTEIN: (Martin's attorney) Your Honor, I'd indicate for the record that I had a discussion with Mr. Martin this morning earlier. Today is the day set for trial.

He has indicated a desire to represent himself in this matter. I will indicate to the court that I have explained to him the hazards of so doing. It is a 187. But it is Mr. Martin's desire to represent himself in this matter.

THE COURT: Well, he is a complete, absolute idiot and fool to do it. If you want to commit suicide, I will



accommodate you.

THE DEFENDANT: Thank you, Your Honor.

THE COURT: But I want you to understand that we will proceed to trial in this matter today. If you want to try to represent yourself, you are welcome to do it, but I think you are a complete idiot.

I will not give you one hand whatsoever. I will have to treat you the same way I treat Mr. Grodin who has been an attorney for a great number of years and Mr. Mason -- who will be trying this?

MR. MASON (prosecutor): I think Mr. Grodin or myself.

THE COURT: -- who have tried a great number of cases. So as



long as you completely understand the danger in which you are doing. As far as I am concerned, you will absolutely be committing suicide, but that will be up to you.

THE DEFENDANT: Thank you.

MR. GOLDSTEIN: Your Honor, may I indicate that I am currently engaged in Department 121, Because of that, I didn't feel this matter would go to trial today.

I have advised Mr. Martin that I will bring him my entire file -- if that's his desire -- I will bring it to him tomorrow.

What I am indicating is I don't have the file with me today, and I think Mr. Martin





would need that file. I probably could arrange to have it for him today. I could have it brought down, whatever the court's desire is.

THE COURT: I assume he wouldn't need the file to select the jury today and give it to him tomorrow. I think he is completely insane to do it.

MR. MASON: I don't understand counsel. Today is the date of trial. He didn't bring the file with him.

MR. GOLDSTEIN: As I indicated, I am engaged in a jury trial. I am giving my closing argument at 10 o'clock.

THE COURT: Mr. Martin, do you fully understand now that this matter is ready to proceed



today but that this matter would simply trail that, start in a day or two? But if you want to represent yourself, we will go ahead and start today. Is that what you want to do?

THE DEFENDANT: Yes, Your Honor.

THE COURT: And you are ready to proceed today?

THE DEFENDANT: No, I am not.

THE COURT: Well, I am not going to continue the case.

THE DEFENDANT: You are asking me a question. I said I am not ready to proceed today.

THE COURT: Mr. Goldstein will not be relieved and the matter will simply trail this matter. The court may find that the motion to represent himself is



untimely because I have no intent of continuing this case.

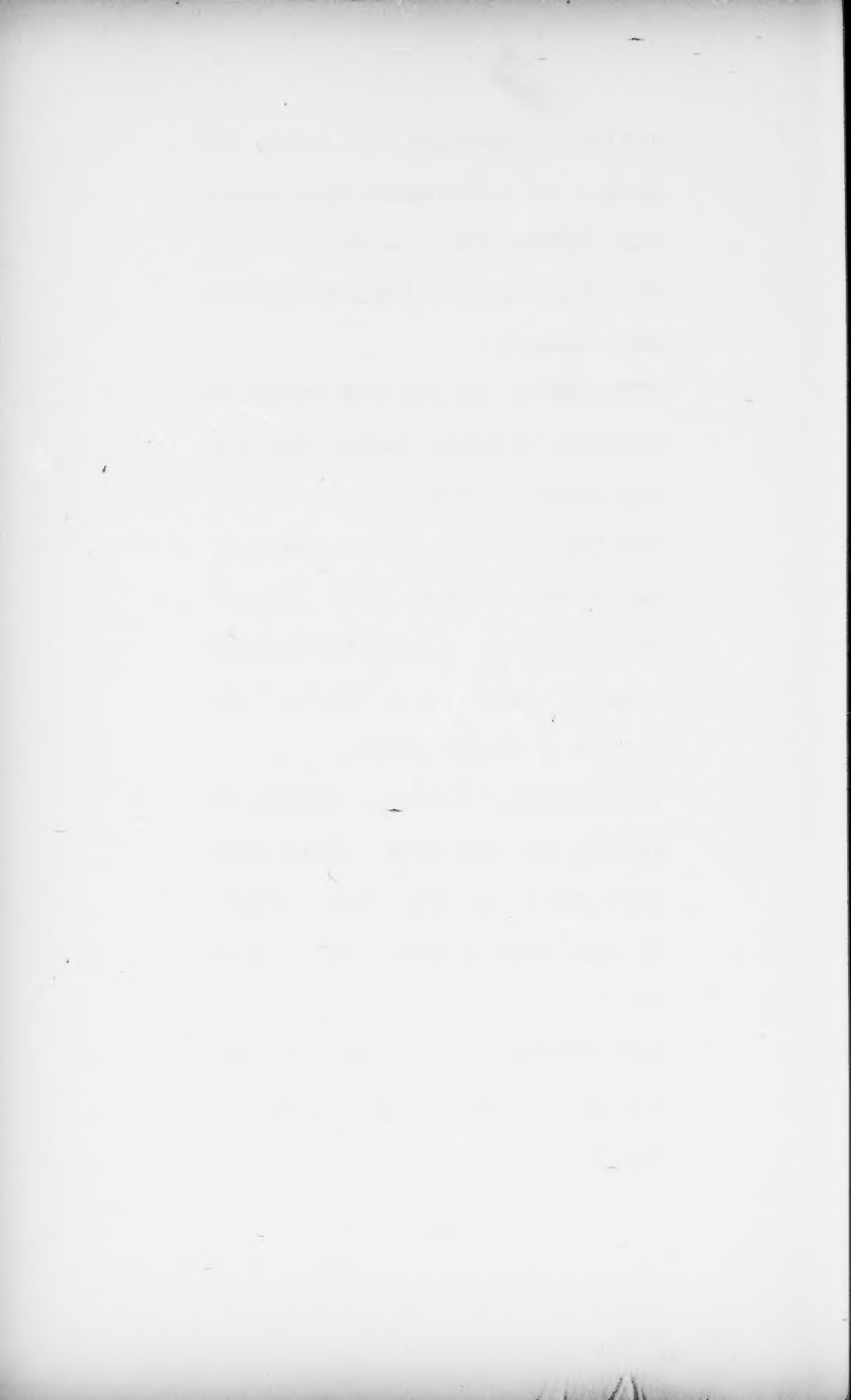
THE DEFENDANT: I am letting the court know I like to represent myself.

THE COURT: If you are ready to proceed to trial today, you can represent yourself --

THE DEFENDANT: I was ready in December. When the People wasn't ready, I gave the People time. Now, why can't the People give me time?

THE COURT: I have no intent of giving you any time. This case goes back to May 30th, 1980. It has been a year, so I have no --

THE DEFENDANT: It has not been a year. I have been in custody for seven months.



MR. MASON: We are going to ask that this matter trail for a few days so we can do a witness check to ascertain --

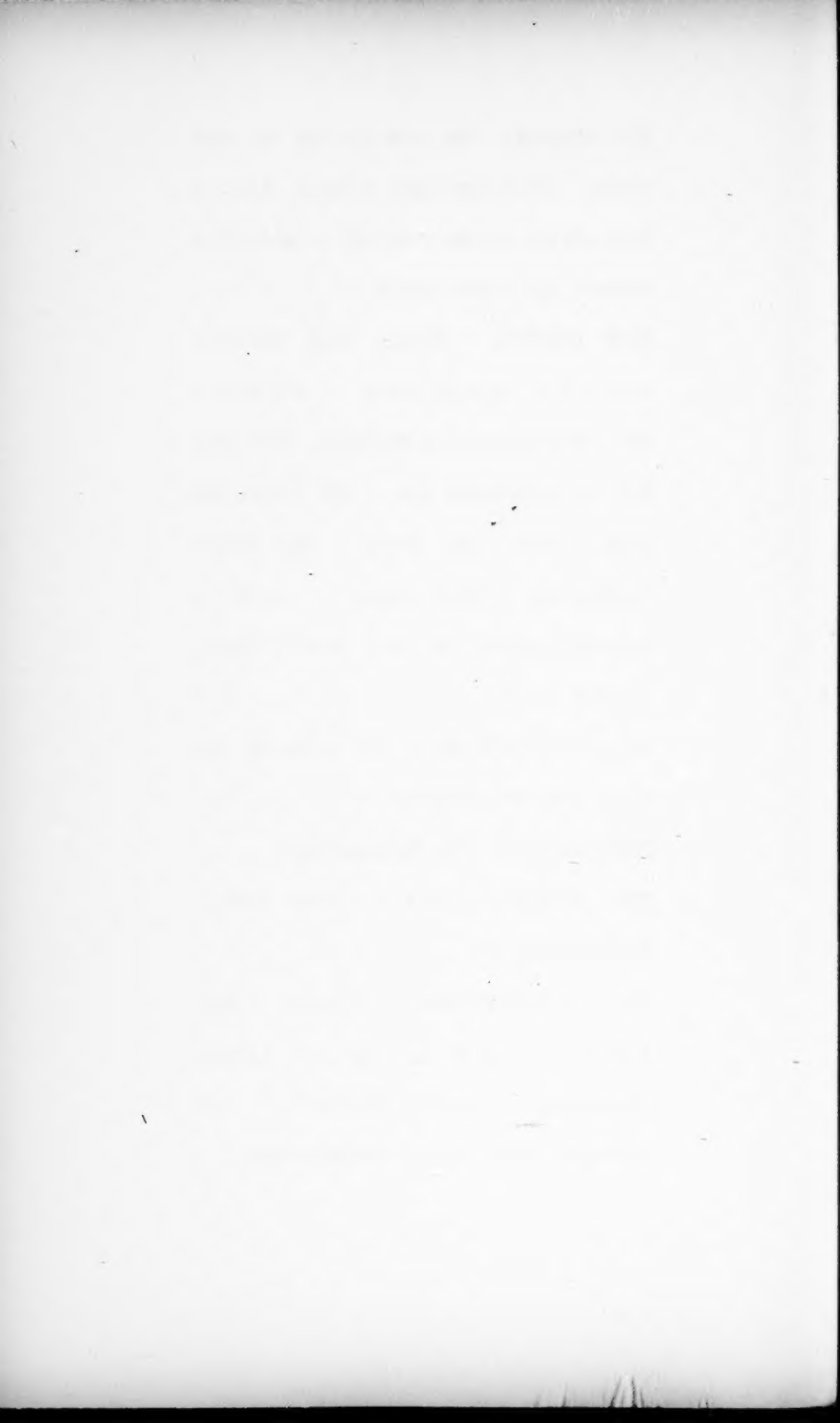
THE COURT: Well, the matter will simply trail Mr. Goldstein's matter, the one he is engaged in. As soon as that one is over, we will commence this one. And I expect that to be, what, two, three days?

MR. GOLDSTEIN: It should be over by Wednesday.

THE COURT: By Wednesday.

MR. MASON: Trail this until Wednesday --

MR. GOLDSTEIN: Could that trail -- I'm sorry -- until Thursday, Your Honor? It should end late Wednesday, I



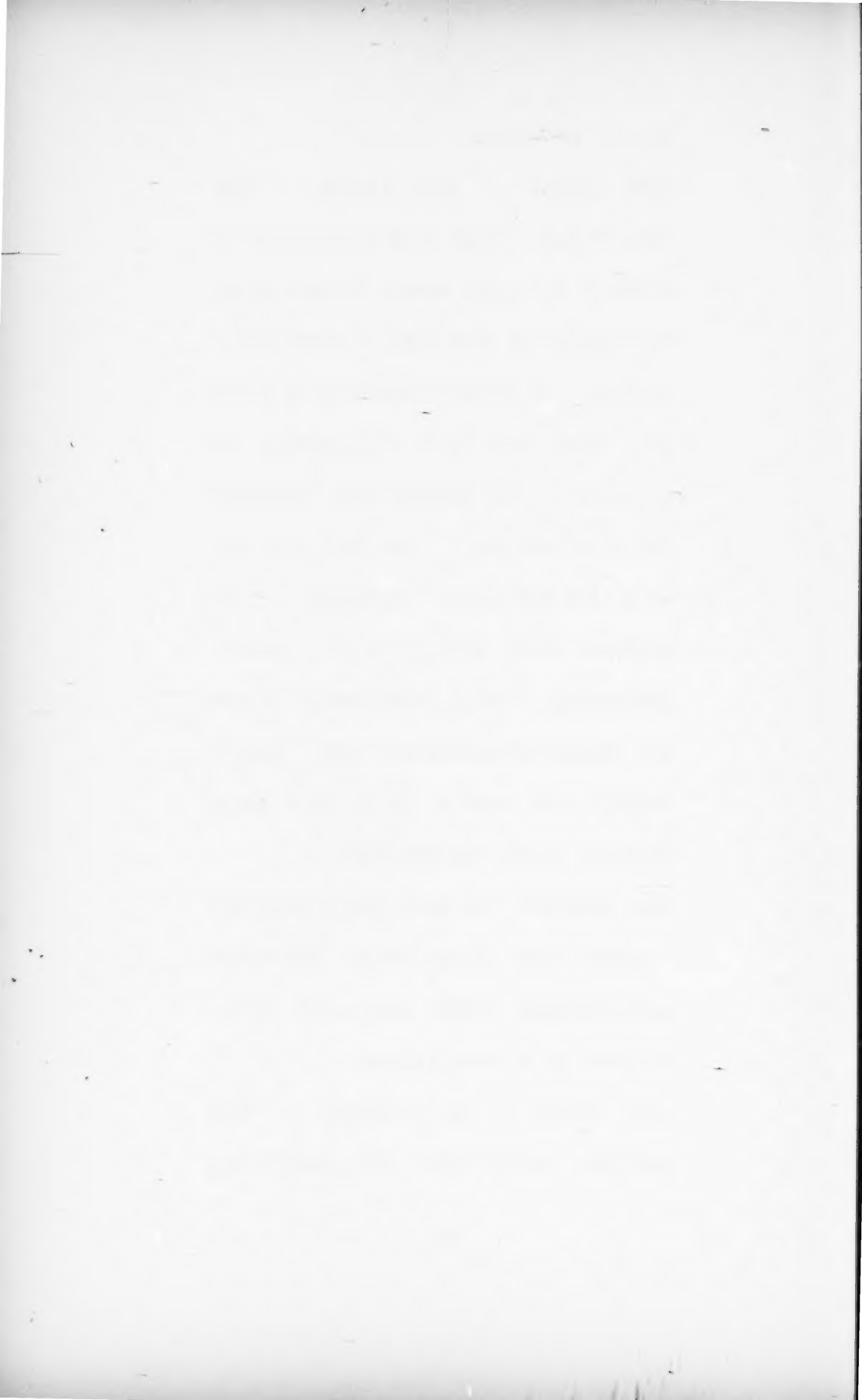


would believe.

THE COURT: All right. The court will find the defendant's motion to represent himself as untimely on the basis that this matter is approximately a year old now and the defendant is not ready to represent himself in the matter. So the motion will be declared untimely. The matter will simply trail until Thursday. Will everybody check on their witnesses, and, hopefully, we won't have the same fiasco with witnesses.

MR. MASON: We are not going to select the jury until we have assurances that all the witnesses are available.

THE COURT: All right. The matter will go on trailing



status then. Thank you very much."

The trial commenced on May 5, 1981, and Martin was convicted of second degree murder with use of a firearm on May 14, 1981. He was sentenced to fifteen years to life plus two years gun enhancement. His conviction was affirmed by the California Court of Appeal, Second District. The California Supreme Court denied review. Martin then twice petitioned the California Supreme Court for a writ of habeas corpus. Each time the petition was denied without a hearing. Martin now petitions this Court for a writ of habeas corpus under 28 U.S.C. § 2254.

#### THE RIGHT OF SELF-REPRESENTATION

The constitutional right of self-representation, recognized in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.562 (1975) must be timely



asserted. Fritz v. Spalding, 682 F.2d 782, 784 (9th Cir. 1982). "A defendant must however have a last clear chance to assert his constitutional right before meaningful trial proceedings have commenced. Thus, a motion to proceed pro se is timely if made before the jury is empaneled, unless it is shown to be a tactic to secure delay." Id.

Here Martin asserted his Faretta right on the morning of trial, before the jury was empaneled. It was, therefore, timely as a matter of law, unless it was made for the purpose of delay. Armant v. Marquez, Slip Op. No. 84-5672 (9th Cir., filed 9/24/85); Fritz, 682 F.2d at 784.

In Fritz, the state appellate court found that the petitioner's motion to represent himself was "a tactic" to delay his scheduled trial. The district court made no finding of purpose to delay, but



relied solely on the effect of the delay and denied the requested writ. The Ninth Circuit vacated the order of the district court and remanded for an evidentiary hearing to determine whether Fritz' motion to proceed pro se was made as a tactic to delay the start of trial.

In Armant, the Ninth Circuit held that the district court was correct in not considering the petitioner's purpose for requesting to proceed pro se because, in contrast to Fritz, the state appellate court did not find that the motion was a tactic to delay trial.

This case is similar to Armant. Neither the trial court nor the state appellate court found that Martin's request to represent himself was for the purpose of delay. Instead, the state appellate court evaluated whether granting the motion would have the effect





of delay and concluded that "to have granted his request would have resulted in unjustifiable delay of the trial and obstruction of the orderly administration of justice."

In both Fritz and Armant, the Ninth Circuit has clearly held that the "effect of delay" is not the appropriate legal standard to use in evaluating the timeliness of a motion to proceed pro se. "Delay per se is not a sufficient ground for denying a defendant's constitutional right of self-representation." Fritz, 682 F.2d at 784; Armant, supra.

Because there is no suggestion in the record that Martin made his request for the purpose of delay, under Armant, there is no need for an evidentiary hearing and Martin's request was timely as a matter of law. He was therefore entitled to exercise his Sixth Amendment



right to represent himself.

#### DENIAL OF CONTINUANCE

The remaining issue in this case is whether the court's denial of Martin's continuance motion under these circumstances was an abuse of discretion. "An abuse of discretion will be found if after carefully evaluating all relevant factors, we conclude that the denial was arbitrary or unreasonable." Armant v. Marquez, Slip Op., No. 84-5672 (9th Cir. filed 9/24/85); United States v. Flynt, 756 F.2d 1352, 1358 (9th Cir. 1985).

In Flynt, the Ninth Circuit listed four factors that appellate courts have considered when reviewing denials of requests for continuances. These factors are reiterated in Armant. "First, we look to the degree of diligence by the appellant prior to the date beyond which the continuance is sought. Second, we



consider whether the continuance would have served a useful purpose if granted. Third, we weigh the inconvenience that granting the continuance would have caused the court or the government. Fourth, we look to the amount of prejudice suffered by the appellant. These factors must be considered together, and the weight given to any one may vary from case to case. At a minimum, however, in order to succeed the appellant must show prejudice resulting from the court's denial." Armant, supra.

#### DILIGENCE

Martin first requested permission to represent himself on the morning of his trial. The reason for his motion to proceed pro se was that his defense counsel had failed to subpoena two witnesses Martin believed could corroborate his claim of self-defense. Petitioner



claims that it was not until the day of the trial that he was informed that these two witnesses had not been subpoenaed. Thus, he had had no cause to consider self-representation up to this point. Under these circumstances, Martin exercised adequate diligence in asserting his right to represent himself. He could not "reasonably be expected to have made the motion at an earlier time." Fritz at 785.

#### USEFULNESS OF THE CONTINUANCE

Because it was not until the day of the trial that Martin learned his attorney had not subpoenaed the two witnesses he deemed to be crucial, he was unprepared to defend himself immediately. A continuance, if granted, would have served a useful purpose. Martin would have had a chance to secure his witnesses and to prepare his defense. "In fact, if





granted, the continuance would have allowed for the exercise of a right guaranteed by the United States Constitution." Armant, supra.

#### INCONVENIENCE

The record indicates that granting Martin's request for a continuance would have resulted in little, if any, inconvenience to the court or to the prosecution. The court was willing to let the matter trail for several days so that the prosecution could make a witness check and defense counsel could finish another trial. Subsequently, rescheduling was already required. Thus, the third factor mitigates strongly in Martin's favor.

#### PREJUDICE

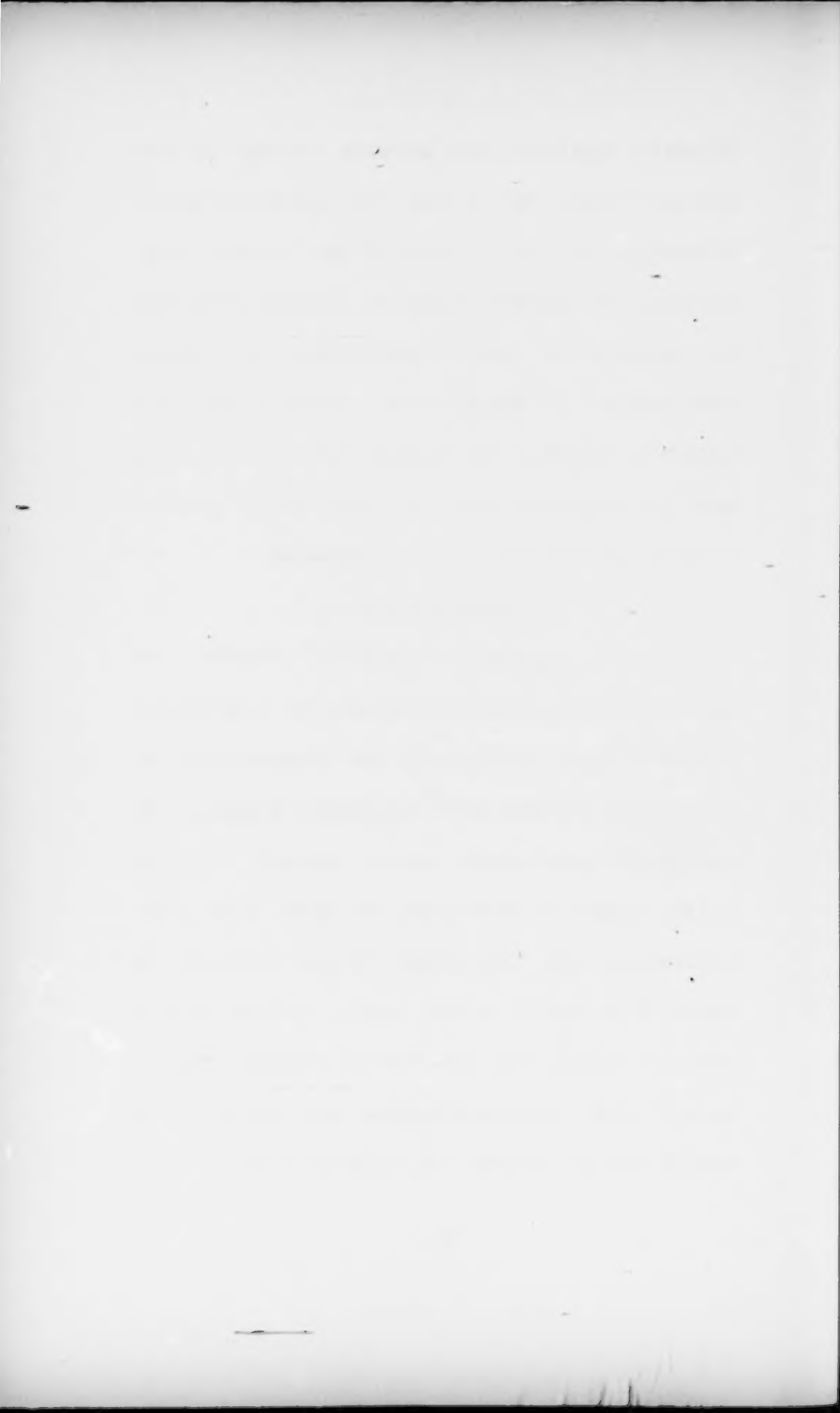
The final factor to be considered is the prejudice suffered by Martin because of denial of the continuance. It is clear that Martin felt he could defend



himself against the murder charge on the ground that he acted in self-defense. Although he had identified these witnesses, he needed time to locate them and to ascertain the usefulness of their testimony. Thus, the result of the court's refusal to grant the continuance was to deprive him of testimony potentially effective to his defense.

#### CONCLUSION

Like Armant, Martin "made an unequivocal, timely request to represent himself, and there was no suggestion of a purpose to delay." Armant, supra. He suffered prejudice as a result of the trial court's decision to deny the continuance, and the other three factors we have discussed also weigh in Martin's favor. Thus, the denial of a continuance under the circumstances of this case would be an abuse of discretion by the



trial judge.

The burden is on the prosecution to prove beyond a reasonable doubt that the error was harmless. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967); Bradford v. Stone, 594 F.2d 1294 (9th Cir. 1979). It is settled in this circuit that an error is prejudicial if "there is a reasonable possibility that the error materially affected the verdict." United States v. Valle-Valdez, 554 F.2d 911, 915 (9th Cir. 1977). The question is not whether the jury could have found Martin guilty on the evidence presented to it. The central issue is whether the prosecution has sufficiently demonstrated that, because of the strength of its case, the error did not beyond a reasonable doubt materially affect the jury's decision. Hinman v. McCarthy, 676 F.2d 343, 349-



351 (9th Cir. 1982).

In the instant case, the denial of Martin's request for a continuance effectively denied him the opportunity of presenting his claim of self-defense to a murder charge. A reasonable possibility exists that this improper denial affected the outcome of the case against him.

Under the compulsion of Fritz and Armant the writ must be granted. IT IS THEREFORE RECOMMENDED that this Court issue an Order granting the petition.

DATED: October 28, 1985

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JOSEPH REICHMANN  
United States Magistrate





## APPENDIX F



2 Crim.

No. 40292

(Super.Ct.No. A359646)

COURT OF APPEAL  
SECOND APPELLATE DISTRICT  
DIVISION TWO

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THE PEOPLE,

---

Plaintiff and Respondent,

VS.

---

DWIGHT EDWARD MARTIN,

---

Defendant and Appellant.

---

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O P I N I O N

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NOT TO BE PUBLISHED  
IN THE COURT OF APPEAL OF THE  
STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION TWO

THE PEOPLE,	)	2 CRIM. NO.
	)	40292
Plaintiff and Respondent,	)	
	)	(Super.Ct.No.
v.	)	A359646)
	)	
DWIGHT EDWARD MARTIN,	)	
	)	
Defendant and Appellant.)	)	
<hr/>		

Dwight Martin appeals from the judgment entered following his conviction by jury of second degree murder (Pen. Code, §§ 187, 189). He contends: "I. The trial court erred in denying the clergyman-penitent privilege. II. The trial court erred in failing to order and review a probation report before sentencing. III. The trial court erred in failing to allow appellant to represent



himself."

Considered in accordance with the standard for appellate review (People v. Johnson (1980) 26 Cal.3d 557, 562), the evidence established that in the evening of May 30, 1980, appellant and the victim were sharing "Sherm" cigarettes in an apartment where appellant lived with Joanne, who was visiting Mrs. Gladys Harrell in another apartment in the building. Mrs. Harrell heard "a blast like a sonic boom," and Joanne ran downstairs. A few moments later, Joanne returned and told Mrs. Harrell that appellant "'has shot a man and he's dead; got two holes in him.'" Shortly thereafter, Mrs. Harrell saw Joanne leave the building with appellant, who was carrying a gun. Appellant and Joanne proceeded to Rose Jordan's home, and he left the gun there.





Appellant and Joanne then went to the home of Larry Hargrew, an associate minister of the Bethany Baptist Church. Appellant asked Hargrew to take him to the Los Angeles Greyhound Bus Station. At the station, just before appellant got on a bus, he told Hargrew that he shot a friend who threatened him while they were sharing "Sherm" cigarettes.

Appellant was arrested two months later in Nashville, Tennessee, at which time Joanne told the arresting officer that appellant had killed a man while he was "Shermed."

Appellant testified in substance that a dispute arose as to the sharing of the Sherm cigarettes among himself, the victim, and one Elijah; and he shot the victim when the victim threatened him with a skillet.

When called as a witness by the



People, Hargrew refused to testify, asserting the clergyman-penitent privilege. (Evid. Code, § 1032.) At a hearing of the privilege issue outside the presence of the jury, Hargrew testified that he is an ordained minister of the Baptist Church and an "ex-con" himself who helped appellant straighten out his life.<sup>1/</sup> To support his claim of privilege he

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1. The judge stated that he himself was raised in the Baptist Church and knew of no tenet of the Baptist religion that a clergyman received confidential confessions as do Catholic priests. Hargrew testified that he was aware of that distinction. Then the judge asked whether there was a tenet providing for a Baptist clergyman to accept a confession and give forgiveness. Hargrew answered: "A I don't remember accepting a confession. Q What? A I don't remember accepting any confession and I know I don't deserve the right to forgive anybody of anything. [¶] I am nothing but another ex-convict who has straightened out his life. [¶] That's where I was coming from when I talked to Silky [appellant]; from my past experience. [¶] That's what we had in common."



produced a book entitled "The New Directory For Baptist Churches," which included tenets of the church. He particularly emphasized tenet 7.<sup>2/</sup>

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2. Tenet 7 was read into evidence as follows: "'Civil governments, rulers, and magistrates are to be respected and in all temporal matters [sic] but not contrary to conscience and the word of God is to be obeyed but they have no jurisdiction in spiritual concerns and have no right of dictation to control or interference with matters of religion but are bound to protect all good citizens in the peaceful enjoyment of their religious rights and privileges. [¶] No organic union of church and State can or should be tolerated but entire separation maintained. The church should neither ask for nor accept support from civil authority since to do so would imply the right of civil dictation and control. [¶] This appointed religion belongs to those who profess it.' . . . 'Whence does a minister derive his authority for the exercise of ministerial functions for preaching, administering the ordinances and other perogatives? For no man taketh this honor unto himself. [¶] Whence is it then? Not from the church for no church holds any self any such authority to bestow. Not from a counsel, since counsels possess no ecclesiastical authority. Not from the state for the state has no right of interference in matters



After reviewing the tenets and testimony, the trial court ruled that there was no privilege, expressly finding that (1) the primary purpose of appellant's going to Hargrew was to obtain a ride to the bus station, not for any penitential communication or confession, and (2) the tenets read into evidence do not come within the penitential communication privilege provided for in Evidence Code section 1032, which provides as follows: "As used in this article, 'penitential communication' means a

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of fate, competence, and conscience, and possesses no control over or authority in ecclesiastical affairs. [¶] The minister therefore derives his credentials as a preacher of righteousness and the right to minister as a priest in spiritual services from no human source unto all individuals but directly from Christ, the great head of the Church by the wisdom and endowment of the Holy Spirit. [¶] He who calls and deals and authorizes he sends forth his heralds with authority to preach the Gospel to the end of the age.' "





communication made in confidence, in the presence of no third person so far as the penitent is aware, to a clergyman who, in the course of the discipline or practice of his church, denomination, or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communications secret."

Appellant unpersuasively urges that the trial court erred in denying the clergyman-penitent privilege. As the trial court properly found, appellant's purpose in communicating with Hargrew was to obtain a bus ride out of town, not to confess and receive absolution. Moreover, neither Hargrew's testimony nor the tenets established that he was a "clergyman who, in the course of the discipline or practice of his church, denomination,



or organization, is authorized or accustomed to hear such communications and, under the discipline or tenets of his church, denomination, or organization, has a duty to keep such communication secret." (Evid. Code, § 1032. See People v. Johnson (1969) 270 Cal.App.2d 204, 208; Simrin v. Simrin (1965) 233 Cal.App.2d 90, 94; and generally People v. Thompson (1982) 133 Cal.App.3d 419, 425-427, and "Communication to Clergyman as Privileged" 71 A.L.R. 3d 794.)

In addition, of course, the basic facts in this case were not disputed and Hargrew's evidence was not only redundant to that which was otherwise produced, it was consistent with the defense theory as developed by appellant in his own testimony. Therefore, if any error occurred in its receipt, it was harmless beyond any doubt.



Equally unavailing is appellant's contention that despite his express waiver of his right to a probation report the court nonetheless erred in failing to order one before honoring his request for immediate sentencing. Penal Code section 1203, subdivision (b), mandates such a report only where a convicted felon "is eligible for probation." Since here the jury found appellant guilty of a murder in which he had used a firearm within the meaning of Penal Code section 1203.06, subdivision (a)(1)(i), he was not eligible for probation. (See People v. Bradley (1981) 115 Cal.App.3d 744, 753.) Of course, a court always has the discretion to order such a report (Pen. Code, § 1203, subd. (c)). However, in this instance we find no abuse of that discretion in light of appellant's informed demands, notwithstanding the fact he



insisted upon them against the advise of counsel.

Contrary to appellant's final contention, the trial court did not err in denying his request to represent himself. Appellant first made such request after the case had been called for trial, thus failing to invoke his right to proceed in propria persona within a reasonable time prior to commencement of trial. (People v. Windham (1977) 19 Cal.3d 121, 128.) Moreover, after the court had expressed its inclination to grant his request, appellant stated that he was not ready to proceed. Therefore, to have granted his request would have resulted in unjustifiable delay of the trial and obstruction of the orderly administration of justice. The court did not abuse its discretion in denying the belated request. (See In re Gary U. (1982) 136 Cal.App.3d 494, 499.)





The judgment is affirmed.

NOT TO BE PUBLISHED.

\_\_\_\_\_, J.  
GATES

We Concur:

\_\_\_\_\_, P.J.  
ROTH

\_\_\_\_\_, J.  
BEACH



DECLARATION OF SERVICE BY MAIL

JOHN M. RATELLE v.  
Re: DWIGHT EDWARD MARTIN,

Ninth Circuit No. 87-6424

I, Felipe Fulgencio,  
declare that I am over 18 years of age,  
and not a party to the within cause; my  
business address is 3580 Wilshire  
Boulevard, Los Angeles, California 90010;  
I served three copies of the attached

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE  
NINTH CIRCUIT

on each of the following, by placing in  
an envelope addressed as follows:

Dwight Edward Martin, C34053  
Richard J. Donoboan Correctional  
Facility 1-3-L206  
480 Alta Road  
San Diego, CA - 92179

I hereby certify that I am employed  
in the office of a member of the Bar of  
this Court at whose direction the service  
was made.

Each said envelope was then, on  
OCT 10 1989 sealed and  
deposited in the United States Mail at  
Los Angeles, California, the county in



which I am employed, with the postage thereon fully prepaid.

That I caused a copy of the above document to be deposited with the Clerk of the Court from which the appeal was taken, to be by said Clerk delivered to the Judge who presided at the trial of the cause in the lower court.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on OCT 10 1989 at  
Los Angeles, California.

Felipe Fulgencio

Declarant

DFR:dld  
LA89US0003